

ANSWER

To a late Pamphlet, Entitled

*An Examination of the Scheme of
Church Power laid down in the
Codex Juris Ecclesiastici An-
glicani, &c.*

S H E W I N G

The unfair Representations and groundless Reflections made by the Author of that Pamphlet :

A N D T H A T

The Scheme of Church Power laid down in the *Codex Juris Ecclesiastici Anglicani*, is in Support and Maintenance of the ROYAL SUPREMACY, and agreeable to our LAWS and CONSTITUTION.

By the Author of THE PARALLEL.

Dolus, an Virtus quis in Hoste requirat? VIRG.

L O N D O N:

Printed for J. ROBERTS near the Oxford-Arms in
Warwick-Lane. MDCCXXXV.

(Price Two Shillings.)





A N A N S W E R

To a late Pamphlet, Entitled

*An Examination of the Scheme of
Church Power, &c.*



T cannot be unknown to those who have perused the Writings of the present Age, what Pains have been taken to represent the Establishment of the Church, and the Means which the Laws have provided for preserving its Government, Doctrine and Discipline, as destructive of the Liberty of the Subject; and all Pretences to Church Power, as a Design to establish an Ecclesiastical Tyranny. This was carried on by *Tindal*, *Collins*, and other professed Infidel Writers; who judged right, that if there was no Church, or the present Establishment could be demolished, their Point would be a considerable Gainer by it. The same Design has been pursued

sued by another Tribe of Men, who call themselves *Freetinkers*, and whose fundamental Principle it is, that none can be a Friend to Liberty, who is not an Enemy to the Establishment of the Church. But I have not met with any Writing that has let itself loose to such a Degree of *Rage* and *Fury* against Church Power and all its Adherents, as an Answer to a Pamphlet called *The Parallel*; the main Design of which was, to vindicate the Doctrine and Discipline of the Church, and the Provision the Laws have made for their Preservation. This provok'd that Writer to open loudly against *Oaths* and *Subscriptions* of all Kinds, as keeping *Men of Honour and Conscience out of the Church*:

“ I would here, says he, let the over-scrupulous
“ and conscientious Man into a Secret, which

The Pow-
ers claim-
ed by the
Hierarchy
examined,
&c. p. 52. “ is this ; That all *human Creeds* in matter of
“ Divine Faith, all *State Subscriptions to Or-
thodoxy and true Religion*, are nothing but
“ Ecclesiastical Tricks, and a Spiritual *Hocus-
Pocus* to get Money. You ought to consider
“ your selves therefore with these Men as in
“ a State of War, as having no more Right
“ to your Faith than to your Property. One
“ Man comes up to you with a Pistol pointed
“ to your Breast, and demands your Money ;
“ another with a Creed to demand your Faith,
“ by which he means nothing but Money : As
“ these are equally Robbers, you ought to
“ treat them both alike, and to stand upon
“ Honour and Conscience just as much with
“ one as you would with the other. No
“ Man can be oblig'd upon any Principle of
“ Justice or Morality to treat them other-
“ wise than as common *Enemies in a State of
War*, i. e. to treat them as they really are.

" This Doctrine may perhaps seem new and
 " strange; but yet I dare stand to it, and shall
 " venture, as Occasion may be offer'd, to justi-
 " fy it, against the old Trade of Creed-making;
 " and I doubt not but to prove, that they who
 " act upon this Principle, are much honester
 " Men than *they who reduce them to it*, and lay
 " them under a Necessity of it." - - - " If Self-
 " defence must be always lawful, and a Man
 " cannot be bound to sacrifice his Life or Pro-
 " perty to the Right of Truth with another in
 " a State of War with him, what Right or
 " Claim can a Spiritual Robber have more than
 " a Temporal one?"

Let us enquire against whom all this is levell'd: What are the *State-Subscriptions* required by Law? And who has reduced them to it? With whom are they then in a State of War? Against whom do they bid Defiance? The Subscriptions required by the Statutes of the Realm are, To the Articles of Religion, to the Declaration against Transubstantiation, and to the Belief in the holy Trinity. It would be needless to enumerate the several Statutes, or the Persons, or Occasions upon which they are required to *subscribe*: It is sufficient to observe, that it is the *Legislature* of this Kingdom; 'tis the King, Lords and Commons, who have, as he calls it, *reduced them to it*. The Application is too obvious.

I shall not trouble my Reader with the Arguments these Writers have made use of against the Church's Power, because they have been more fully stated and enforced (I wish I could say with less Rancor) by one, who has afforded them his kind Assistance, only, as he says, for the Sake of Truth, in *an Examination of the Scheme of Church Power laid down in the Codex Juris Ecclesiastici*

clesiastici Anglicani, &c. But if it shall be found that his Arguments tend to the Diminution of the Regal Supremacy, the Rights of the Church, and the Benefit of the Subject, and that nothing has been advanced by that Learned Author, but what is consistent with the Honour of our Constitution, the Prerogative of the Crown, and the Rights of the Legislature, some other Reason must then be assign'd for his *present* Undertaking; especially as this admired Work has now been in the Hands of the Learned for upwards of twenty Years, and, in the Words of a Right Reverend Prelate, been justly esteemed *the best Book Coventry's that has been written on the Subject it treats, since the Reformation.*

An. 1734. As the *Examiner* declares, that he bears his Testimony against what is therein advanced only for the Sake of Truth, he ought to declare the whole Truth, otherwise he is a false Witness; and it must be done without Envy or ill Will, otherwise he is a suspected Witness, and can have no Credit. And yet when the Objections come to be consider'd, I am perswaded it will appear, that the Inferences of the Learned Compiler have been grossly misrepresented, and that the Principles upon which he builds have been the declared Sense of our first Reformers, the Opinion of some of the greatest Men our Church and Nation have produced, the firmest Friends to the Protestant Religion, and to our Constitution both in Church and State; and that there is scarce a single Passage from whence the *Examiner* would endeavour to draw an Odium upon its Author, but what arises from a voluntary Misapplication, or a false Quotation of his Words. By false Quotation, I mean leaving out, or not connecting

ing that Part of the Sentence, which would otherwise destroy the Force of his Argument.

The first Objection then is, That his Lordship by deriving the Episcopal Power from a twofold Original, *viz. from the Word of God, and from the Laws of the Land*, is either contradictory, or setting up a Claim of Independency on all huinan Authority.

The Law of God is one of the Grounds of the Dr. and Laws of *England*, an essential and constituent Part Stud. 1. 1. thereof, and by being incorporated therewith does c. 6. not thereby lose its divine Original, unless the Author would insinuate that claiming a Right from the Law of God is setting up a foreign Power. A Recognition therefore of a Right under a divine Authority, cannot be called an *original Grant* by the Laws of the Land; yet Exam. where a Statute is declaratory, what is thereby p. 8. declared may with great Propriety be said to appear by that Statute. What his Lordship has asserted in relation to the Episcopal Power and its Original, is therefore to be taken both in a scriptural and a legal Sense; in a scriptural, from the Word of God; in a legal one, from the Statute, which declares it to be so. But the Examiner would confine it to a legal Sense, from these Words of our Learned Author, as quoted by Exam. him: "In that Sense only he considers the Distin- p. 8. "ction between the divine and human Authority of Pref. Cod. "our Bishops." But let us take the whole Sen- J. E. A. tence: "If there were any need to support this p. 17. "Distinction in a legal Sense, (for in that Sense "only I am now considering it against those who "contend, that the supposing a Jurisdiction in "the Church by a divine Right, is inconsistent "with the Principles of the Reformation) such

" Support might be had, from those very Authorities which have been so often alledg'd,
 " to prove the *Jurisdiction* of our Bishops merely human." Where then is the Absurdity in considering it in one Light only, against particular Persons, altho' a stronger Evidence might be given for it? Has not the great Mr. Boyle confined his Lectures to Arguments drawn from Reason only, without any Prejudice to the divine Authority? His Lordship is happy in the Choice of his Expression, tho' perverted by a disingenuous Adversary. As to the Claim of Independency on all human Authority, the following Words in the same Section will falsify the Charge.
 " It is by way of Distinction from this," [viz. the Authority of the Bishop by the Word of God] " that Judge Hales, speaking of the legal Power of Bishops, call'd it *Jurisdiction in Foro exteriori, which is confessed on all Hands to be derived from the Crown,*" viz. the external Exercise and Administration of Justice and Discipline in such Courts, and in such Ways and Methods, as are by Law or Custom establish'd in this Realm.

Thus in the earlier Ages of Christianity, after the Roman Emperors had embraced the Faith, and before the Ambition of the Church of Rome had attempted an universal Empire, was the Distinction held of spiritual and temporal Power as separate from each other, tho' both under the Guidance and Direction of the supreme Civil Magistrate as God's Vicegerent.

Auth. Coll. 1. Tit. 5. Nov. 5.

" *Maxima quidem in hominibus* (says Justinian) *sunt Dona Dei à supernâ collata Clementia, Sacerdotium & Imperium.* Et illud quidem Divina ministra, hoc autem Humanis praesidens ac Dilectiam exhibens, ex uno eodemque principio utramque procedentia, humanam exornant vitam."

It

It was very cautious in the *Examiner*, at his setting out, to make his Challenges against those Fathers of our Church, and the two Universities, who may be thought to have adopted (what he calls) his Lordship's Mistakes; since he must be sensible, that what the Bishop has asserted, in relation to the Episcopal Authority, from the Word of God, has been the uniform Opinion of the greatest Divines of the Church of *England*, and the constant Determination in the Divinity Schools in both Universities.

I shall mention some Authorities from those, whose sound Learning and true Religion are unexceptionable, and who have never been thought guilty of exalting the Power of the Church to the Prejudice of the State.

Bishop *Stillingfleet* says, "That the Church is Sermons,
" a Society in its Nature, Design, Duties, Of Vol. I.
" fices and Censures, really distinct from any ^{p. 366.}
" mere human Institution --- Since the Church
" doth subsist by virtue of Christ's own Appoint-
" ment, and That Church is to have peculiar
" Officers to instruct and govern it, it must fol-
" low, that even in a *Christian Kingdom*, the
" Church is a Society distinct from the Com-
" monwealth."

And in another place he proves, That the Of Ex-
Power of the Church doth extend to the Expul- commun.
sion of Offenders from the Privileges of it; and Vol. II.
that the fundamental Rights of the Christian p. 423.
Church do not escheat to the Commonwealth upon their being united to a Protestant State.

Bishop *Burnet*, speaking of the ancient Coun- Vind. of
cils, and of the *English* Bishops and others who the Ord.
were concerned in the Reformation, adds: "As of the Ch.
" it were a great Scandal on those Councils, to of Engt.
" say that they had no Authority for what they p. 29.
" did,

" did, but what they derived from the Civil
" Power; so it is no less unjust to say, Because
" the Parliament impowered some Persons to
" draw Forms for the more pure Administration
" of the Sacraments, and enacted that those on-
" ly should be lawfully exercised in this Realm,
" which is the Civil Sanction; that therefore
" these Persons had no other Authority for what
" they did. Was it ever heard of, that the Ci-
" vil Sanction, which only makes any Constiti-
" tution to have *the Force* of a Law, gives it
" another Authority than a Civil one? The
" Prelates, and other Divines, that compiled
" our Forms of Ordination, did it by *virtue of*
" the Authority they had from Christ, as Pa-
" stors of his Church, which did empower them
" to teach the People the pure Word of God,
" and to administer the Sacraments, and per-
" form all other holy Functions, according to
" the Scripture, the Practice of the Primitive
" Church, and the Rules of Expediency and
" Reason: and this they ought to have done,
" tho' the Civil Power had opposed it: In
" which Case their Duty had been to have sub-
" mitted to whatever Severities and Persecutions
" they might have been put to for the Name of
" Christ, or the Truth of the Gospel. But, on
" the other hand, when it pleased God to turn
" the Hearts of those that had the chief Power,
" to set forward this good Work; then they
" did, as they ought, with all Thankfulness
" acknowledge so great a Blessing, and accept
" and improve the Authority of the Civil
" Powers, for adding the Sanction of the Law
" to the Reformation, in all the Parts and
" Branches of it. So by the Authority they
" derived from Christ, and the Warrant they
" had

" had from Scripture and the Primitive Church,
 " these Prelates and Divines made those Alterations and Changes in the Ordinal ; and the King and the Parliament, who are vested
 " with the supreme legislative Power, added
 " their Authority to them, to make them obligatory on the Subjects.

The Learned Bishop *Potter*, in his Treatise, which, as the Preface sets forth, contains an Account of the *Constitution, Government and Rights of the Christian Church*, chiefly as they are described by the *Scripture*, and the *Fathers of the three first Centuries*, has one whole Chapter of p. 212. the Powers which belong to a Christian Church, where he shows at large, what is the general Nature and Design of the Powers which belong to the Church ; and that God has strictly appropriated the ordinary Exercise of the Ecclesiastical Power to the Officers of his Church in their respective Stations. And amongst the Powers which belong to the Christian Church, he shows, that one is the Power of making p. 321. Canons and Laws for the Behaviour of its Members in Spiritual Affairs, and another the Power p. 340. of executing those Laws. Under the latter Head he shows, first, That our Blessed Lord p. 343. has entrusted the Church, and particularly the Governors of it, with Authority to censure Offenders, and to exclude them from its Communion. Secondly, That this Authority was constantly exercised, and held to be of Divine Right in the first Ages of the Church. Thirdly, That it is most agreeable to Reason, and p. 367. the general Sense and Practice of Mankind, that the Church should exercise this Authority.

Dr. *Scot* likewise, in his *Christian Life*, shows Vol. II. at large, That Christ hath erected a Spiritual Part 2. Govern- p. 384.

Government in his Church ; and amongst the proper Ministries to be exercised by the Bishops and Governors of it, one is, To make Laws and Canons for the Security and Preservation of the Church's Peace and good Order : And another is to execute that Spiritual Jurisdiction which Christ hath established in the Church.

p. 443.

p. 439.

Dr Wake's State of the Church and Clergy of England
Ch. 1.
Sect. 49.

p. 23.

3 Vol.
Qu. 29.

View of the Civil and Eccl. Law.

p. 214.

1 Cor. v.

Our most Reverend Metropolitan, in his Dispute against Dr. *Atterbury*, asserts, That the Bishop of every Diocess has, *by Divine Commission*, a Power to govern the Church of Christ over which he is placed ; that this was the constant Sense of all the ancient Councils and Fathers of the Church.

And amongst the Foreign Protestant Divines, *Turretin* in his *Distributiones Theologæ*, &c. proposes this Question : *An Ecclesiæ aliqua Potestas Spiritualis competit, distincta à Politicâ* ; and maintains it fully in the Affirmative.

If the *Examiner* had wanted only Scriptural Authority, an Author, to whom he appeals, would have referred him to it (Dr. *Ridley*) “ In the Example of St. *Paul*, which never goeth to any Temporal Power to punish the Incestuous Person, altho' there were sundry Laws, both in Greek and Latin, written of these Matters, but doth it by the Spiritual Sword alone.”

The Truth is, this Point hath been the Subject of Controversy between the *Papists* and us, ever since the Establishment of the Reformation under Queen *Elizabeth* : The Popish Writers have all along upbraided the Church of *England* with being a meer *Parliamentary Church* ; and our Writers have all along defended the Reformation in that Point, as knowing, That the Rights and Powers of a Christian Church, as such,

such, remained entire, notwithstanding the Recognition of the Regal Supremacy.

After that, *Erasmus* advanced a more general Notion, That where the Civil Power became Christian, there was no longer any Authority in the Church; and upon the Publication of his Book, not only the Church of *England*, but other Churches abroad, took Occasion to examine and confute that new Doctrine, by maintaining an Authority in the Church, *after* the State's becoming Christian as well as *before*. So that in truth, this Point is so far from needing either Explanation or Support, that the Subject is exhausted; and as there was no Occasion to call for either, so this Writer had no *Right* to call for them, because the Introduction to the *Codex Juris*, &c. professedly treats of a meer *Human Right* as recognized (together with the Divine Right) by several successive Acts of Parliament, and of no *other Right*. Neither could the Learned Author, with any Propriety, have forsaken his Subject, which was a *Legal Right*, and fallied out into a Point which did not concern that Subject, viz. a *Divine Right*.

However, to gratify this Writer's Curiosity, and to let him see that this Claim of a Divine Right is not now first set a foot by some aspiring Ecclesiastick as he and others would suggest; I was willing to set him and his Readers right upon that Head, and to let them see that it is a Point which the Writers of the Church of *England* have uniformly maintain'd ever since the Establishment of the Reformation. And the Reason why I have referr'd him to the Writers of a more *modern Date*, is, because their Books are in every one's Hands, and the Treatises distinct and full, particularly the Bishop of

Oxford's,

Oxford's, which was written on Occasion of Dr. Tindal's reviving the *Eraffian Scheme*, in a Book, which he falsely call'd, *The Rights of the Christian Church*, while he was labouring to destroy every thing that could properly come under that Name. And yet the Examiner may have had the Pleasure of seeing him constantly employ'd in exercising the King's Supreme Ecclesiastical Power in almost all Commissions of Delegates.

Great Stress has been laid upon the Commissions for the Exercise of Jurisdictions, granted to Archbishop Cranmer and others. But if this Writer had not been blinded with Zeal for a Cause, he must have seen that the Clause in those Commissions, (*Præter & ultra ea quæ tibi ex sacris literis divinitus commissa esse dignoscuntur*) made them an Argument against him, especially when compared with the Clause in the several Acts of Uniformity, upon which the Author of the *Codex Juris*, &c. founds the Claim of a *Divine Right*, as recognized by the successive Parliaments, that confirmed the said Acts, whereby the Bishop is required "to correct and punish according to such Authority as he has by God's Word, and as to him shall be committed by the Ordinance of this Realm.

But what can be said in excuse for this Writer, who could sink a Clause of so great Consequence in the Argument he treats of, who would infer that these Commissions prove a mere Human Authority, when they expressly likewise acknowledge a *Divine one*; or how can a Reader depend upon his Veracity in any other Point, who so grossly prevaricates in this? Surely those two Clauses upon the same Subject, and relating

ting to the same Persons, and used in the same Reign, may well be allowed to be Comments upon each other; and one would also hope that the *Examiner* should readily allow one Point more, that the *Disuse* of those Commissions, and the Bishops having exercised Jurisdiction in their own *Name*, and under their own *Seals* ever since the *final Settlement* of the Reformation under Queen *Elizabeth*, just in the same manner as they did before the Commissions were granted, is a much stronger Argument against them, than any thing that can be inferr'd from the *Use* of them, while the Reformation was *in settling*, and when it was natural (as it happens in most other Cases) at the first quitting of one Extreme, to be carried into another.

The *Examiner* dwells much upon the ancient Practice before the Conquest, of the Bishop and Sheriff sitting together in the *same* Court. This is a Point about which a great deal has been written by our Antiquaries and Historians, and he might be willing to take this Occasion to show his Reading: But all he has said upon it, as applied to the present Subject, receives a short Answer, which is, That it is nothing to the Purpose. Who knows not that Christian Princes gave the *Cognizance* of many *Temporal* Matters to the Bishops? And as they gave them, they might undoubtedly determine in what Place and in what manner they should be heard; nor has any one been so absurd as to say, that the Bishops enjoyed the Cognizance of those Things by a *Divine Right*; which is the single Point under Consideration: And therefore to make that Fact of any Force or Significancy in the present Case, he should have shewn, that they pro-

proceeded in that mixt Court by *Spiritual Censures*, and that in those Days the Bishop did not exercise the Power of Excommunicating and inflicting other Censures of a Spiritual Nature, upon vicious and irregular Persons, according to the Practice of the Church in the first Ages of Christianity, and the many subsequent Laws and Canons directing them so to do.

p. 16.

He has indeed said, that Vice was punish'd in that mixt Court : But how ? By *Spiritual Censures* ? No, by Corporal Punishments and Pecuniary Mulcts. And who doubts but the inflicting those Punishments and Mulcts, and the proper Enquiries and Examinations in order to it, may at any Time be lodged in the Hands, either of Ecclesiastical or Civil Persons ; as in our Times Ecclesiasticks, as well as others, if they are in the Commission of the Peace, may have their Part in inflicting Temporal Penalties upon all Offences, against which any Temporal Laws have been made ? But the Point he ought to have laboured, and that alone could do him any Service, was, That the Sheriff had as good a Right to inflict *Spiritual Censures*, as the Bishop had to inflict *Temporal Penalties* : And that the Rule laid down by *Bracton*, who wrote in the Time of *Henry III.* had not always been

Lib. 5. c. 2. n. 5. the Rule, even in the Saxon Times : *Si pro peccato vel transgressione fuerit paenitentia injungenda, Jus Ecclesiasticus habet Cognitionem, quia non pertinet ad Regem injungere paenitentias nec ad Judicem Secularem.* And this, I hope, he will not attempt to do.

But that his Inferences from Antiquity may not be wholly neglected, : it may be proper to enquire into the Foundation of his Conjectures ; and it will appear that his Censure arises from his

his own, and not from his Lordship's Mistake. He asserts, " That till the Conquest, (if not p. 15,
 " considerably later) Matters, *which have since*
 " come under Ecclesiastical Cognizance, were
 " heard and determin'd in common with other
 " Suits in the County Court, call'd the *Sheriffs*
 " *Tourn*; where the Bishop and Earl, or in his
 " Absence the Sheriff, sat together. The
 " Hundred Court likewise had this mixed Ju-
 " risdiction, and was held before the Lord of
 " the Hundred and the Ecclesiastical Judge.
 " And the Proceedings in these Courts, as well
 " with regard to Matters *supposed now to be of*
 " Spiritual Cognizance, as those called Civil,
 " were not according to the Course afterwards
 " introduced with the Practice of the Canon
 " Law, *but in the English Method of Juries.*

On the contrary it will appear that the Bishops had distinct Courts and distinct Laws from the Temporal; that the Censures of the Church not proving sufficient for the Suppression of Vice, Temporal Laws were made to inflict likewise Temporal Punishments on the Offenders; and in those Courts, where such Punishments were inflicted, the Bishop sat as Judge, together with the Civil Magistrate. After the Conquest these Courts were *totally* separated, and the Bishop was confined to his own Court, and to proceed according to the Ecclesiastical Laws, whilst the Temporal Courts only inflicted Temporal Punishments. Notwithstanding this, the same Cause might be tried in both Courts; in the one Arti. Cler. for Damages, or Amends for Breach of the c. 6. 2 Inst. Peace; in the other for Correction, and inflicting Coke p. 622 Ecclesiastical Censures: and it is a very modern Doctrine, that where the Temporal Courts can punish, the Ecclesiastical shall not; and Lord

Coke

5 Rep. p. Coke says, " It was resolved by the whole
 5.6. of the " Court in Caudrey's Case, That the Act con-
 King's " cerning the Uniformity of Common Prayer,
 Eccl. " being in the *Affirmative*, doth not abrogate
 Laws. " or take away the Jurisdiction Ecclesiastical,
 " unless Words in the Negative had been ad-
 ded, as *and not otherwise*, or in no other man-
 ner or form; and this appeareth by the gene-
 ral Rule in all our Books." And it was fur-
 ther resolved, that " The Temporal and Ec-
 clesiastical Law have several Proceedings, and
 " to several Ends; the one being Temporal,
 " to inflict Punishment on the Body, Lands,
 " or Goods; the other being Spiritual, pro-
 " salute animæ: The one to punish the outward
 " Man, the other to reform the inward ----
 " Then both their *distinct* and *several* Juris-
 dictions consist and stand well together, and
 " do join in this, to have the whole Man in-
 " wardly and outwardly reformed.

In the Laws made upon the League between
 Lambard, King Edward the Elder, and Gutbrune the
 p. 41. *Dane*, it is said, " Leges humanas (propterea
 " quod pro explorato haberent, nolle sine his
 " quamplurimos aut in Officio contineri suo,
 " aut Ecclesiasticæ morem gerere Discipline) con-
 " scribendas curarunt, easque Christo cum Rege
 " communes promulgarunt, hijs ut eorum coerce-
 " retur temeritas qui Episcopi imperata obedire
 " noluerint.

From this Law may be inferred, that in the
 most ancient Times, the Bishop had originally
 the Care of Ecclesiastical Discipline; and Tem-
 poral Laws were made in aid of Spiritual: That
 his Lordship's Expression can in no wise deserve
 Praef. p. Censure, viz. " Temporal Penalties are to be pro-
 31. vided, as a further Terror and Punishment to
 be

be called in as oft as the Censures of the Church are disobeyed, since for this purpose they were originally provided. Did those Laws then which related to Ecclesiastical Discipline before these Temporal Laws were made, bind the Laity or the Clergy only? It must be admitted they bound the Former, for the Bishops Power alone was sufficient to compel the Latter; nor were they in such cases subject to the Temporal Jurisdiction but by the Force of Temporal Laws.

In the Laws of *Edward the Confessor*, which were a Collection of the ancient Laws of the Land, confirmed by the Conqueror, upon the Report made upon the Oath of twelve Men ^{Lamb. p.} 138. learned in the Laws, chosen out of every County, it is ordained, " *Si quis arrogans pro Episcopis copi Justitiâ emendare noluerit, Episcopus Regi notum faciat: Rex autem constringat malefactorem, ut emendet cui foris-fecit, scilicet primum Episcopo, deinde sibi; & sic erunt Duo Gladii, & Gladius Gladium juvabit.*" If these Causes were to be judged in the County or Hundred Court, and to be tried by a Jury, the same Court had Power to enforce the Judgment, and the Bishop could have no Occasion to apply to the King for Aid. How opprobrious is it then to Royal Majesty to term his Ministers in such cases only *The Church's Hangmen!* ^{Exam. p.} 77.

But to show further that they had *then* distinct Courts, it appears from the same Laws, that they had even Jurisdiction in Temporal Matters in their own Courts, call'd Ecclesiastical Courts, over those who were their Tenants, or lived within their District; and an Appeal lay from them to the Crown in such Cases. " *Quicunque de Ecclesiâ aliquid tenuerit, vel in fundo Ecclesiæ mansionem habuerit extra Curiam* ^{Lamb. 138. Le. Edvardi c. 5.} *Eccle-*

c. 4.

“ Ecclesiasticam, coactus non placitabit quamvis
 “ foris-fecerit, nisi quod absit in Curiā Eccle-
 “ siasticā de Recto defecerit.” And even in the
 Temporal Courts their Causes had the Pre-
 ference. “ Ubicunque Regis Justitia vel cuius-
 “ cunque sit placita tenuerit, si missus Episcopi
 “ veniens illuc causam aperuerit sanctæ Ecclesiæ,
 “ ipsa primitus terminetur, justum est enim
 “ ut ubique Deus præ cæteris honoretur.

Is his Lordship then setting up a Power un-
 known to the Constitution, who is only contend-
 ing for a distinct Right of Jurisdiction in Spi-
 ritual Matters, which tho' much restrained by
 the Temporal Courts, was never denied to be-
 long to the Bishops, from the earliest Ages of
 our Church and Nation, but was enjoy'd by
 them, without Interruption, before some of
 those Courts, which now prohibit them, had
 any Existence themselves, distinct from the
 King's Bench; for the Exchequer was severed
 from it in the Time of *William* the Conqueror,
 and the Common Pleas by *Magna Charta* in the
 Time of *Henry III.* and however the Bounds
 thereof may have been altered, yet a Subor-
 dination to the Temporal Courts in *Ecclesiastical*
Matters was never before contended for.

Spelm. Pr.
2. p. 220.

p. 19.

Selden in
notis ad
Eadm. p.
166.

But to proceed to the Foundation of the *Ex-
 aminer's Assertion*, from whence he would prove
 (what he calls) his Lordship's Mistake. He
 thinks “ It has arisen from some modern Tran-
 slations of the Laws of *Edgar* and *Canute*,
 “ which treat of the County Court.” The Words
 are, *And thaer scpre gemote Bisceop and se
 Ealdorman an thaer aegther taecon ge
 Godeg Rihte ge Moruldes rihte:* According
 to *Brompton's Translation*, *Et interfit præful Comi-
 tatus & Aldermannus, & utriusque doceant Dei Rectum
 & sæculi:*

& sicuti: or according to *Lambard*, *Cui quidem Lamb.*
illius Diaecesis Episcopus & Senator intersunto, quo-
rum alter jura Divina alter humana populum edo-
ceto; or as Dr. *Wilkins*, *Interfit Episcopus &*
Senator & postea doceant tam Divinum jus quam hu-
manum. --- or *Et ibi ubique doceatur*, &c. Yet
 tho' the Translation from the joining of the
 Words **thaer ægther** or disjoining them,
 may be different, yet the Sense is the same, and
 the Word **ge** being repeated signifies *alter* &
alter; or may be render'd *tam & quam*, and
 must imply a separate Office, unless we could
 imagine, that the Alderman was to instruct the
 People in God's Law, and not the Bishop.

The Learned Sir *H. Spelman* gives this Ac- Pt. 2. p.
 count of it, in his Treatise of *The ancient Go- 54.*
vernment of England. " Before they enter'd in-
 " to any Causes (as it is commanded in the
 " Laws of *Canutus*) the Bishop gives a solemn
 " Charge unto the People, touching Ecclesiasti-
 " cal Matters, opening unto them the Rights
 " and Reverence of the Church, and their Duty
 " therein towards God and the King, accord-
 " ing to the Word of God and Divinity :
 " Then the Alderman, in like manner, rela-
 " ted to them the Laws of the Land, and their
 " Duty towards God and the King, and the
 " Common-wealth ---- " Is it possible then that
 the different Translations could create any Mi-
 stake, when the Substance is the same in all ?

His Inference from the Charter of the Con-
 queror is as ill founded. The Words of it are, Seld. ad
 " Propterea mando & Regiæ Authoritate præ- Eadm. p.
 " cipio ut nullus Episcopus vel Archidiaconus 167.
 " amplius in Hundret placita teneant ; nec
 " causam quæ ad regimen animarum pertinet
 " ad judicium fœclarium hominum adducant ;

Exam. p.
 19. “ sed quicunque secundum Episcopales leges
 “ de quacunque causâ vel culpâ interpellatus
 “ fuerit, ad locum quem ad hoc Episcopus ele-
 “ gerit & nominaverit veniat, ibique de causa
 “ sua respondeat non secundum Hundret, sed
 “ secundum Canones & Episcopales leges, rec-
 “ tum Deo & Episcopo suo faciat.” His Infe-
 rence is, “ That the Matters wherein this
 “ Charter is supposed to have given the Bishop
 “ a separate Jurisdiction, were before that Se-
 “ paration cognizable in common with other
 “ Causes according to the course of the Com-
 “ mon Law.” Whereas from this Charter it
 evidently appears, that there were Canon and
 Episcopal Laws, distinct from the Laws of the
 Hundred or Common Law: And whereas it like-
 wise appears, from the before-mentioned Laws
 of *Edward* the Confessor, that they had a se-
 parate Ecclesiastical Court, and also sat, as is
 allow'd, with the Sheriff in the Temporal Court;
 this Charter confined them to their own Courts
 and to Spiritual Causes: And lest it might be
 thought that the Temporal Authority, they had
 before, was to attend them there, forbids them
 to proceed according to the Laws of the Hun-
 dred. As this was a restraining Law, they had
 no great Reason to struggle and to take Advan-
 tage of the Troubles of the following Reigns,
 to settle this limited Jurisdiction. But what
 Strains will not this Author make for the sake
 of a Reflection on the Clergy!

Lamb. p.
 42. Fœdus
 Edoardi
 & Gu-
 throni.

As to the manner of punishing Incest, as he
 has not referr'd us to the Law, I must take no-
 tice of those of *Edward* the Elder, and *Canute*:
 In the former, *Qui fœdo se polluerint Incestu, eorum*
qui fuerit superior Rex babeat, inferiorem Episco-
pus, ni citius cumulate Deo & hominibus compen-
sarint,

sarint, & quod fuerit iis ab Episcopo indictum consecerint. By the latter, *Si quis stuprum Incestum commiserit, sive Capitis cestimatione, sive mulierâ, sive rerum suarum omnium amissione compensato.* But as these were Temporal Laws, I have before observed, that they were only supplemental to the Bishop's Power, because the Censures of the Church proved ineffectual, as the Preamble to the first declares.

The *Examiner* says, " That he has been told p. 6. " by some learned Men, that none of the Bishops for the first 300 Years after Christ claimed any separate exclusive Powers for the Exercise of Church Discipline, but left these Matters to the Provincial and Diocesan Consistories, which in the purer Ages of the Church, were composed of *Bishops, Clergy and Laity.*

To let him see that he has been grossly misinformed in every Article of this Clause, I will refer him to several very learned Writers, who have treated upon this Subject at large, and shown, that in the most early Ages of the Church, none but Bishops, not even Presbyters, unless commanded by them, did exercise of the Church Discipline; and that the *People* never had any Part in those Matters, further than being present, if they pleased to Petition, Represent, &c. but without any Shadow of *Power* or *Authority* in the Business of these Assemblies. And his present Grace of Canterbury, in the Dispute against Dr. Atterbury, who asserted, that the Presbyters had from the Beginning an equal Right of Place and Authority of Voice in the Councils of the Church with their Bishops, says, " This was not wont to be accounted the Church of England Doctrine, nor can it tend

Bp. Potter
of Church
Gov. p.

216. 346.
358. 367.
394. &c.
Vindica-

tion of the

Discipline
of the Cy-
prian Age,

350. 406.
to 412.

426. 427.
428.

Bp. Taylor
Polem.

Disc. p.

115. 135.

The State
of the Ch.
and Clergy
of Engl.

“ to any thing less than to shake the very
 “ Foundation of our Constitution, and furnish
 “ the *Presbyterian* with a new Argument a-
 “ gainst it.” He refers us likewise to Dr. *Beveridge*, who says, “ *Omnia per singulas ætates
 Cod. Can. communia Ecclesiæ negotia per solos Episcopos
 Vind. proœm. n. & nonnullos subinde Presbyteros, Episcoporum
 4. suorum locos tenentes, in Concilio congregatos
 transacta sunt.”*

p. 13. This will show him how idle and groundless his Conjecture is, That when Christianity became the publick Religion of the Empire, the People first, and then the *Clergy*, withdrew from the *Provincial* and *Diocesan* Consistories, as he calls them, as a troublesome and expensive Attendance ; and that this was the *only* Foundation of *Episcopal* Jurisdiction. But if all this were true, as it is certainly false, it still *supposes* an Exercise of *Spiritual Discipline* in the Christian Church, as such, after the Civil Power became Christian, and can therefore be of no Service to an *Eraſtian*, whose fundamental Principle is, That when the Emperors became Christian, all the Power of the Church, as a Church, did *ipso facto* cease. And as to the first Christian Emperors investing the Bishops with a *Real* Jurisdiction, which was before *Nominal*, the Supposition is so void of all colour of Proof, that it is a wonder how it could fall from the Pen of one, who pretends to write about the Affairs of the Church in those Days. It is true, that the Emperors found the Bishops in possession of the Power ; and as they knew it was a rightful Possession, it was just in them to support the Bishops in the *Exercise* of it ; and, to make it more effectual upon the Obstinate and Disobedient,

p. 14.

dient, they extended the secular Arm to their Assistance.

If then the Power of the Church and Clergy for Correction and Discipline, *as grounded on the Word of God*, which the *Examiner* calls a *Fundamental Error*, was the received Doctrine of the Primitive Church, and practised from the earliest Ages of Christianity ; if the same Power which they had, before the Emperors were received into the Body of that Church, continued still in them, tho' supported by Temporal Laws ; the several Statutes which were made upon the Reformation, must, according to the common Rule of Interpretation, be so construed, as to be consistent with other Laws and Statutes, and consistent with the Principles upon which the Law of the Land is founded, one Ground whereof is the Law of God. And altho' the *Church* does in its general Signification comprehend the whole Body of Christians united in the same Faith, yet according to our Saviour's Institution there are distinct Offices in that Body, which have peculiar Powers annexed to them,

The *Examiner* will be so equitable as to allow that in all great Changes and Revolutions in Government, whether of Church or State, many Things have been done during the Heat and Confusion attending such Changes, which upon cooler Thoughts, and in a more quiet and settled State of Things, it has been found necessary to review and explain ; and it is very common on such Occasions to go from one Extreme to the other. At the Reformation, the great Points were, First, to abolish the usurped Authority of the Pope, and then to declare the

King to be supreme Head of the Church, with general Powers, not unlike those that the Pope had exercised ; all which was to be expressed in the *strongest* manner that was possible, to be an effectual Bar against the Return of the Papal Authority. And as to the vesting Ecclesiastical Jurisdiction in the King, our Laws have always considered him as *Mixta Persona*, and *Custos Utriusque Tabulæ*, and so a proper Subject of Ecclesiastical, as well as of Civil Power ; in such manner as had usually been exercised by Christian Princes within their Dominions, antecedent to the usurped Authority of the Church of Rome.

But the bare vesting of Authority in the King to be exercised on such Occasions as he should think proper, did not abolish the ordinary Authority and Jurisdiction of the Bishops in their several Dioceses, nor infer that the Exercise of it stood upon another Foundation than it had done before. This must be proved by *Negative Expressions* in Acts of Parliament, declaring that their ordinary Authority was taken away, and that nothing remained to them as Bishops, but what they were to derive from the King ; or be proved from Facts (in Practice) which *necessarily* suppose and imply it : But nothing like this appears in any Act of Parliament for eleven Years after the Supremacy was vested in the Crown, when indeed it is declared that *Archbishops, Bishops, Archdeacons, and other Ecclesiastical Persons, have no manner of Jurisdiction Ecclesiastical but by, under and from his Royal Majesty.* But it must be remember'd, that this Expression is in the Act, which enables Lay and married Persons to be Judges and Registers in the Ecclesiastical Courts, and ought therefore

to

to be interpreted in Accommodation to the Design of the Act, i. e. as relating to standing Officers in Ecclesiastical Courts, and to the Exercise of Jurisdiction in such Courts, which is what we properly mean by *Ecclesiastical Jurisdiction*, and is not denied to be a Privilege derived from the Civil Power, and subject at all times to Regulations from thence. But *Jurisdiction Ecclesiastical* is one thing, and *Spiritual Power and Authority* another ; one is an inherent Right, and the other the Power of exercising that Right in such a *particular manner* as the Laws of the Land allow and warrant.

The like Answer is to be given to a like Clause in the Act 1 Ed. 6. c. 2. which requires *Process Ecclesiastical* to be in the King's Name, and only tested by the Bishop, and that the King's Arms be set in every *Seal of Office* and *Jurisdiction*, viz. That all this evidently relates to the ordinary *Course of Proceedings* in the Courts established among us by *Law and Custom*, which have Cognizance of many Matters of a *Temporal Nature*. And it is remarkable that the Preamble which leads to the enacting part of that Clause, particularly mentions, *That all Courts Ecclesiastical within the Realms of England and Ireland be kept by no other Power or Authority, either Foreign, or within this Realm, but by the Authority of his most Excellent Majesty.* Add to this, that the Act specially provides, that *Collations, Institutions and Inductions* (which, tho' properly *Judicial Acts*, are not dispatched in the publick Courts) may continue to be made by the Bishops, *under their own Names and Seals*, as they have heretofore accustomed. But whatever was the Design or Extent of this Act, it was unanimously declared by the

twelve Judges, 13 Car. 1. to be repealed and
not now in force.

Hales's
Analysis,
p. 30.

As it appears by the several Statutes, that the Ecclesiastical as well as the Civil Jurisdiction is derived from the Crown, so it has always been admitted that Archbishops and Bishops have by the Laws of the Land Ecclesiastical Jurisdiction under his Majesty, annexed to their Places and Offices primarily and originally in their own Right. And therefore, as to the other Argument, from the Commissions taken out by the Archbishop and Bishops, many things may be truly said ; that there was no Law obliging them to take out such Commissions, nor can we tell upon what Motives or Inducements it was done ; that it does not appear that all the Bishops took out Commissions, nor can we tell how many did ; that they who took them out might think the Spiritual Powers belonging to them, as Bishops, sufficiently acknowledged and secured by the saving Clause, *Præter & ultra ea quæ tibi ex sacris literis divinitus commissa dignoscuntur* ; and that in the same Reign in which these Commissions were taken out, there was first a Parliamentary Recognition of a Right in every Bishop to correct and punish according to such Authority as he had by God's Word : A troublesome Clause, which this Writer would fain get rid of, but cannot. And to show the Distress he is under, he would even make it a Doubt, what the Authority is which the Act declares to belong to the Bishops by God's Word ; when nothing can be more clear upon the Face of the Clause itself, than that it is a Right to correct and punish (in an authoritative way) such as be unquiet, disobedient, and criminous within his Diocese. And, I dare say, no mortal Man, from

from the time of *Edward 6.* to this Day, understood any thing by the Clause, but the punishing Wickedness and Immorality by *Spiritual Censures.*

If we look into the Commissions granted by *Hen. 8.* (one of which was to the Bishop of *Wake's Hereford*) we shall find, that the King having Rights, appointed *Cromwell* to be his Vicar-General, &c. ap- and intending to visit his whole Realm, had pend. n. inhibited the several Bishops, or such of them 144. p. at least as he thought proper, from exercising 222. any part of their Jurisdiction as is usual in all cases upon a Visitation. --- “ Ne pendente visi-
 “ tatione nostra ea quæ sunt Jurisdictionis exer-
 “ cēre attentares seu attentarent per alias literas
 “ inhibuerimus --- Quia tamen ipse *Thomas*
 “ *Cromwell* tot & tam arduis negotiis impeditus
 “ extitit, quod ad omnem Jurisdictionem no-
 “ bis ut supremo Capiti hujusmodi competen-
 “ tem ubique locorum expediend, non sufficiet:
 “ Nos igitur tibi vices nostras sub modo & for-
 “ mā inferius descriptā committend, fore, Te li-
 “ centiand, esse decrevimus -- ad ordinand. Igi-
 “ gitur -- instituend. Testamenta proband. &c.
 “ Teque licentiamus per præsentes ad nostrum
 “ bene placitum duntaxat duraturas. Quacunq;
 “ Inhibitione ante dat. præsentium *Emanat.* in
 “ aliquo non obstante.” When King *Edward*
 came to the Throne, new Commissions were
 granted, upon the same Account, altho' the
 Vicegerency was expired ; and in that to Arch- *Burnet's*
 bishop *Cranmer* are these Words: “ Qua- Reform. 2
 “ cunque Inhibitione ante dat. præsentium in ali- vol. col.n.
 “ quo non obstante.” 2. p. 9.

It seemed to be the Opinion of those Times, that by acknowledging the King to be supreme Head, he had the same Power as all other su-
 perior

terior Ordinaries have of visiting all the Inferiors, and inhibiting them until he had finished his Visitation. When Queen *Eliz.* came to the Crown, this Power by Implication was not thought sufficient, but it was more truly judg'd that the Royal Supremacy, in itself, implied no more than the ordinary Course of administering Justice by the Crown in Ecclesiastical Matters by its legal and proper Officers, the Archbishops, Bishops, &c. And therefore in the Act for restoring the Spiritual Jurisdiction to the Crown, there was a special Clause, since repealed, to give her this extraordinary Power to appoint Commissioners to visit, &c. But the Supremacy was never imagined to imply a Right to Ordain. What would the *Examiner* then infer from the former Commissions, that the Bishops were not thought, or allowed, to have any Jurisdiction in themselves? Far otherwise: For an Inhibition implies a Jurisdiction in the Inferior, and where they have none an Inhibition is needless. The Commissioners were therefore only a temporary Provision to enable them to act during the Inhibition without incurring a Contempt: And amongst other things they were *licensed*, notwithstanding the Inhibition, *Ad Ordinandum quoscunque infra Diocesin tuam ubicunque oriundos*, which is far from conveying an *Original Power*, but is a Permission only of exercising within their own Diocese that Power of Ordaining which was *Divinitus Comissa*, and inherent in them as Bishops of the Church of Christ. The Power itself of Ordaining was never claimed by any Christian Prince, or derived from him; and *Nemo plus juris ad alium transferre potest, quam ipse habet*, is an undoubted Rule of Reason as well as of Law.

v. Coke 5
Rep. Cau-
dry's Case.

Law. The Jurisdiction of the Bishops was derived from the Crown as the Fountain of all Jurisdiction, but the *Ministratio* of *Spiritual Things* was expressly disclaimed by all our Princes upon the Reformation : And Cromwell as Vicar General to K. H. 8. altho' commissioned to exercise all the King's Ecclesiastical Power, never pretended to that of Ordaining, tho' the Exercise of this Power in the Bishop was impeded by the King's Inhibition. Thus in a Metropolitan Visitation, when the Archbishop inhibits any of his inferior Suffragans, they cannot, without incurring a Contempt of his Inhibition, Ordain any Persons within their own Diocese, unless they are licensed so to do by the Archbishop, whilst there cannot be the least Pretence that the Bishop's Original Power of Ordaining is derived from such Licence. The Inhibition, which suspends their *Acting*, implies their *Right* : And this is the utmost that those *Commissions* did intend.

EXEMPTIONS from the ordinary Authority of the Bishop, and Jurisdictions transferred to Laymen by Authority of Parliament, and still exercised by them, is an Argument upon which the *Examiner* dwells much ; but when set in a true Light it will by no means bear the Stress he lays upon it. Every one knows the Original of Exemptions ; that they were created by the Usurpation of the Popes, who by an over-ruing Power deprived the Bishops of their just Rights of visiting, correcting, &c. and put those Places under the *immediate Jurisdiction* of the See of *Rome*. This was the laudable Original of Exemptions, and this the State they were found in at the Reformation, when the Religious were dissolved, and their Houses and Possessions

Possessions vested in the Crown, with all the Advantages and Privileges, under which the former Possessors had enjoyed them. But tho' the Parliament would not wholly take from *Henry 8.* what they had given him by some general Words in the Hurry of the Dissolutions, (considering him probably as a Person capable in himself of Ecclesiastical Jurisdiction, both as King of *England*, and as lately declared *Supreme Head of the Church*, and the Districts exempted, as before severed from the Diocese of the Bishop, and made Extra-Diocean;) and altho' the King by the like general Expressions in the Grant of the Possessions of the Religious might be understood to have conveyed, with them, to some few Lay-Subjects, a Right of Exemption from the ordinary Jurisdiction, which being a legal Right could not be divested; yet these Instances have been very few, considering the vast Number of exempt Places before the Dissolution. And what the Sense, both of King and Parliament, in this Matter was, appears fully by the Stat.

31 H. 8. c. 13. § 23. " And be it further
 " Enacted, ---- That such of the said Monasteries, Abbathies, &c. --- and all Churches and
 " Chapels to them or any of them belonging,
 " which before the Dissolution ---- or coming
 " to the King's Highness were exempted from
 " the Visitation or Visitations, and all other
 " Jurisdiction of the Ordinary or Ordinaries,
 " within whose Diocese they were situate or
 " set, shall from henceforth be within the Jurisdiction and Visitation of the Ordinary or
 " Ordinaries, within whose Diocese they or
 " any of them be situate or set; or within
 " the Jurisdiction and Visitation of such Person or Persons, as by the King's Highness
 " shall be limited or appointed: This Act, or
 " any

any other Exemption, Liberty or Jurisdiction to the contrary notwithstanding."

In the next Reign, (3 and 4 Ed. 6. c. 11.) the King, as H. 8. before had been, was authorized by Act of Parliament to appoint thirty two Persons, (sixteen of the Clergy, and sixteen of the Laity) to compile a new Body of Ecclesiastical Laws, and, having ratified them under the Great Seal, to publish them, and they by Virtue of that Act to be taken for the King's Ecclesiastical Laws of this Realm. A Commission was accordingly granted to sixteen of the Clergy, the most able and zealous Establishers of the Reformation, of which Archbishop Cranmer was the first, and had the principal Direction; and to sixteen of the Laity, four hereof were Civilians, and four Common Lawyers: And this Body of Laws was proceeded on and finished, and the Form of a Ratification prepared; but the King's Death prevented their being actually ratified, as the Act directed. From the Head of *Privileges* and *Exemptions*, it appears what was the Sense of the Compilers concerning them.

"Quoniam Libertates & Immunitates Ecclesiasticæ licentiosam videmus sæpenumerò afferre peccandi securitatem; Volumus ut Episcopis liceat in omnia Collegia, Societates & Cœtus, quæ quidem in eorum Diœcesibus constinent, quantumcunque Privilegiis præmuniantur, inspectare, poenasque peccatis illorum assignare, non solum communibus Visitacionum, sed omnibus aliis temporibus, cum magnitudo criminum postulabit, & eandem Archiepiscopus in suâ Provinciâ potestatem habebit." So early after the Dissolution were those Exemptions considered as so many *Blemishes*

Ref. Leg.
Ecc. f. 64.
Cod.
1018.

mishes on our Church, which this Writer now makes use of, as one of his chief Engines to overthrow the *Constitution* of it.

The *Examiner's Arguments* from the State of the Royal Supremacy, in the Reigns of K. H. 8. and Edw. 6. have been particularly considered; and I must now desire him to accompany me to a more settled Time, the Reign of Queen Elizabeth; by which time People had learn'd many Things by Experience, and seen the Unfitness and Consequences of several Steps that had been taken at the first setting out of the Reformation, particularly in the Articles of the Royal Supremacy, and the Ordinary Jurisdiction of the Bishops. Now therefore we hear nothing of a *Vicar General* for Ecclesiastical Affairs, nor of *Commissions* to be taken out by Bishops for the Exercise of their Jurisdiction, nor of the Queen's Arms to be set in their Seals; but all such *Restraints* and *Incumbrances* as had been laid upon their Jurisdiction were removed, and their Proceedings in the Exercise of it restored to its ancient Course.

As to the Royal Supremacy, one of the first Things the Parliament entered upon, was to undo what had been done in the Reign of Queen Mary in favour of the See of Rome, and then to vest in Queen Elizabeth a full Power of exercising Spiritual or Ecclesiastical Jurisdiction by Commissioners to be appointed under the Great Seal, *when, and as often, as she, her Heirs, or Successors, should think meet or convenient*; but not one word in the Act, of the Bishops deriving their Authority from the Crown; and much less of their having no Power or Authority but what they derived from it. By the Oath of Supremacy, as settled by that

Act,

Act, all Ecclesiastical Persons and Civil Officers, are to testify, and declare, *That the Queen's Majesty is the only Supreme Governor of this Realm, and of all other her Majesty's Dominions and Countries, as well in all Spiritual or Ecclesiastical Things or Causes, as Temporal.* This was afterwards further explained in the Articles of Religion approved of by the Parliament, and directed to be subscribed by all Ecclesiastical Persons, in the manner following: *The Queen's Art. 37. 13 Eliz. c. 12.*

Majesty hath the chief Power in this Realm of England, and other her Dominions, unto whom the chief Government of all Estates of this Realm, whether they be Ecclesiastical or Civil, in all Causes doth appertain, and is not, nor ought not, to be subject to any Foreign Jurisdiction. And it is thereby likewise explained what was meant by *Chief Government*, viz. *That only Prerogative which we see to have been given always to all Godly Princes in Holy Scripture by God himself: That is, That they should rule all Estates and Degrees committed to their Charge by God, whether they be Ecclesiastical or Temporal, and restrain with the Civil Sword the stubborn and evil Doers.*

Upon this Explanation it was that Bishop Usher founded his Discourse concerning the Oath *p. 20.* of Supremacy, and the respective Rights of the Crown and the Church; showing, that nothing in that Oath did at all diminish or affect the Rights of a Christian Church, as such. "God
 " (says he) for the better settling of Piety and
 " Honesty amongst Men, and the repressing
 " of Profaneness and other Vices, hath esta-
 " blish'd two *distinct* Powers upon Earth.
 " The one of the *Keys* committed to the
 " Church; the other of the *Sword* committed
 " to the Civil Magistrate. That of the *Keys*
 " is

" is ordained to work upon the inner Man,
 " having immediate Relation to the remitting
 " or retaining of Sins : That of the Sword
 " is appointed to work upon the outward Man,
 " yielding Protection to the Obedient, and in-
 " flicting external Punishments on the Rebel-
 " lious and Disobedient."

The Statute 13 Eliz. c. 12, as above, is the last Declaration that has been made by Authority of Parliament concerning the Royal Supremacy, and the Nature and Extent of it ; and therefore the Act 1 Eliz. c. 1. as before described, and this Explanation of it, is our Constitution at this Day.

If this, which is called his Lordship's Fundamental Mistake, be the received Doctrine of the Church of *England*, as from the great Authorities I have mentioned cannot be doubted, *viz.* *That the Bishops have a Power of Correction and Discipline in the Church grounded on the Word of God*; and if the Church of *England* be part of our Constitution, how can " these Principles be inconsistent with our excellent Constitution, and dangerous to it ?" Why is this great and learned Author to be misrepresented, for teaching those Doctrines, and asserting those Powers which our Church holds to be derived from Christ and his Apostles. Those who dissent from us, are against Episcopacy and all the Powers appropriated thereto, and are for Lay Synods ; and yet whilst they keep themselves quiet, they are allowed to enjoy their Religious Principles, tho' contrary to ours, and are tolerated by the Laws of the Land. Are they not then willing to allow the Church so much as a Toleration, but represent that as incon-

Exam. p.
4.

inconsistent with the Government, which has always been a Part of it ?

The wisest Law-givers of the Ancients, to give a Sanction to their Laws, pretended to a Divine Original, and *Numa* and *Lycurgus* feigned *Egeria* and *Apollo* to be the Authors of their Institutions. And have our Laws less Force, which *really* have a Divine as well as a Human Original ; or is it a Diminution to the Civil Magistrate, that God as well as He commands it ?

It is said, that upon this Ground the Popish Tyranny was built ; but it is a Mistake : It was brought about by prostituting Christianity itself to serve their slavish Purposes, by extending the Power which God had given the Church to a Claim of Temporal Dominion, which he had not given. It is no Argument against a just Power, that it has been abused. But from whence are our Fears ? We turn our whole Force against Superstition, when that is certainly not the reigning Vice of the Age. Is it not the Subtilty of the Friends of *Rome*, to raise false Alarms, that when real Dangers come they may be neglected ? We are exclaiming against Church Power, when I may truly assert, That the Power and Authority of the Church of *England* was never at so low an Ebb, thro' all the Annals of former Ages, at any one Period of Time, except that, when both Church and Monarchy were buried under popular Distraction and Confusion ; without any one Act of Parliament made since the Reformation expressly to abridge its Authority, except that concerning the Oath *Ex Officio*, which related only to the Method of Proceeding ; and the Act of Toleration, which exempted

13 Car. 2.

D the

the Dissenters, under certain Limitations, from several Penal Laws, by Reason of, and in Compassion to, the Scruples of a tender Conscience. Has not this Toleration been inviolably preserved ; or have the Bishops made use of the Power they have under the Crown of *England*, to the Diminution of the Prerogative of the Crown, or the Prejudice of the Subject ? And in particular, has the Right Reverend Prelate (whom thus they persecute, as far as lies in their Power) ever made use of that Authority, which the Law hath given him, but for the Suppression of Immorality and Profaneness ? Has he oppressed any one upon account of their Scruples of Conscience or Principles of Religion, in the whole Course of his Administration ? They have received a publick Challenge, and are not able to produce a single Instance.

Pref. p.
17.

But let us proceed to the Consideration of the other Branch, which is the Subject Matter of the *Codex Juris, &c.* viz. "The Power
" which is vested in the Bishops for the due
" Administration of Government and Disci-
" pline in the *Church of England* according to
" the Laws of the Land :" And see whether
the *Examiner* has been more just in his Re-
flections upon its learned Author upon that
Head, than he has been upon the other.

Exam. p.
38.

This Writer asserts, "That there is a Sub-
" ordination of Jurisdiction of the Spiritual
" Courts to the Temporal, as of an Inferior
" to a Superior ; and that it is the Province
" of one to restrain and correct the Excesses
" of the other :" And he adds, "That this
" Supremacy of the Courts of *Westminster-Hall*
" over

" over the Ecclesiastical, hath in all Ages
 " given great Disturbance to that part of the
 " Clergy who have affected an absolute Independ-
 " ence on the State." And this Expression he is
 so fond of, that he again repeats it; and the p. 42.
 contrary Opinion is censured by him, " As an
 " Affront on the Justice of the Kingdom, and
 " bordering very near on a Libel on the Consti-
 " tution."

That the Clergy have at any Time since the Reformation claimed or affected an absolute Independence on the State, is false. That Prohibitions have and may be granted to the Ecclesiastical Courts when they hold Plea of such Temporal Matters as have not been granted to them, but properly belong to the Temporal Courts, and thereby exceed the Bounds of Jurisdiction the Law has assigned them, was never doubted: But that such Superiority implies a Subordination of Jurisdiction as from an inferior to a superior Court, is by no means the Consequence. The Court of Chancery grants Injunctions, in Matters of Equity, to the King's Bench, to stop its Proceedings; yet can it be said, That the King's Bench is an inferior and subordinate Jurisdiction to the Court of Chancery? So far from it, that it does not appear that the Chancellor held any Court of Inst. p. Coke, 2. Equity, nor that any Causes were drawn before 552. the Chancellor, for help in Equity, before the Time of Hen. 4. and it is certain, that before Sir Hen. Spelman, P. 2. p. the Conquest the King's Bench was itself a 219. Court of Equity, as well as of Law. But the Supremacy of the Courts of Westminster-Hall over the Ecclesiastical, to restrain and correct the Excesses of it, in general, as a subordinate Jurisdiction in matters Spiritual, which the Word

Subordination necessarily implies, (for the Ecclesiastical Courts having no Cognizance of Temporal Matters, cannot be subordinate in Temporal Matters, but in Spiritual) is a Power that was never yet claimed by them, and will, upon Enquiry, be found to be contrary to the Laws of the Land, injurious to the *Prerogative* of the Crown, and destructive of the Regal Supremacy over these Courts, and in all Causes Ecclesiastical. But if he means no more than a Superintendency, that is, the Power of restraining the Ecclesiastical Courts from intermeddling in Temporal Matters, he is very unhappy in the Choice of his Expressions; whilst to humble the Bishops the *Examiner* divests the Crown of its Supremacy, which is one of its highest Prerogatives, and fixes it in the Courts of *Westminster-Hall*, to whom as to the Supreme they are said to be *Subordinate*, so that they are not to derive their Power either from *God* or the *King*.

That the Temporal and Spiritual Jurisdictions are separate and distinct, both flowing from the Crown, as the Fountain of Jurisdiction, and under his Majesty as supreme Head of both; is the Language of all our Laws, and the Opinion of all our greatest Lawyers.

One of the first Acts that was made at the Beginning of the Reformation, 24 Hen. 8. c. 12. *For the Restraint of Appeals*, runs thus:

“ Where by sundry old authentick Histories
 “ and Chronicles, it is manifestly declared and
 “ expressed, That this Realm of *England* is
 “ an Empire, and so hath been accepted in
 “ the World, governed by one supreme Head
 “ and King, having Dignity and Royal Estate
 “ of the Imperial Crown of the same; unto
 “ whom

“ whom a Body Politick compact of all Sorts
 “ and Degrees of People, divided in Terms
 “ and by Names of *Spirituality* and *Tempo-*
 “ *rality*, been bounden and owen to bear, next
 “ to God, a natural and humble Obedience ;
 “ He being also institute and furnished by the
 “ Goodness and Sufferance of Almighty God,
 “ with plenary, whole and entire Power and
 “ Pre-eminence, Authority, Prerogative, and
 “ Jurisdiction, to render and yield Justice and
 “ final Determination to all manner of Folk
 “ Resiants or Subjects within this his Realm,
 “ in all Causes, Matters, Debates and Conten-
 “ tions, happening to occur, insurge, or begin
 “ within the Limits thereof, without Restraint
 “ or Provocation to any Foreign Princes or
 “ Potentates of the World :

“ The *Body Spiritual* whereof having Power
 “ when any Cause of the Law Divine hap-
 “ pened to come in question, or of *Spiritual*
 “ *Learning*, That it was declared, interpreted,
 “ and shewed by that part of the Body Politick
 “ call'd *the Spirituality*, now being usually called
 “ *The English Church*, which always hath been
 “ reputed, and also found of that sort, that
 “ both for Knowledge, Integrity, and Suffi-
 “ ciency of Number, it hath been always
 “ thought, and is also at this present, *sufficient*
 “ and *meet of itself*, without the intermeddling of
 “ any exterior Person or Persons, to declare and
 “ determine all such Doubts, and to administer
 “ all such Offices and Duties, as to their *Rooms*
 “ *Spiritual* doth appertain : For the due Admi-
 “ nistration whereof, and to keep them from
 “ Corruption and sinister Affection, the King's
 “ most noble Progenitors, and the Antecessors
 “ of the Nobles of this Realm, have suffici-

" ently endowed the same Church, both with
 " Honour and Possessions: And the *Laws*
 " *Temporal* for tryal of Property of Lands or
 " Goods, and for the Conservation of the People
 " of this Realm in Unity and Peace, without
 " Rapine or Spoil, was, and yet is, admini-
 " stred, adjudged, and executed by sundry
 " Judges and Ministers of the other Part of the
 " said Body Politick called the *Temporality*. And
 " both their Authorities and *Jurisdictions* do con-
 " join together in the due Administration of Ju-
 " stice, the one to help the other.

(2.) " And whereas the King's most noble
 " Progenitors, and the Nobility and Commons
 " of this said Realm, at diverse and sundry
 " Parliaments, as well in the Time of King
 " Ed. 1, Ed. 3, Ric. 2, Hen. 4, and other
 " noble Kings of this Realm, made sundry Or-
 " dinances, Laws, Statutes, and Provisions,
 " for the entire and sure Conservation of the
 " Prerogatives, Liberties, and Pre-eminencies
 " of the Imperial Crown of this Realm, and
 " of the Jurisdiction Spiritual and Temporal
 " of the same, to keep it from the Annoyance
 " as well of the See of *Rome*, as from the Au-
 " thority of other Foreign Potentates attempting
 " the Diminution or Violation thereof" ---

Those of my Readers who have not weighed
 this Statute, may not be displeased at my re-
 citing so much of it. And as the learned Au-
 thor of the *Codex Juris* founds upon it the se-
 veral Corollaries he lays down; and as the Point
 controverted by the *Examiner* was, whether
 those Corollaries were fairly drawn, and well
 founded; it had been a fair Part in him to have
 recited the Statute at large, that the Reader
 might have had some share in judging who was
 in

in the right. But this was not for his Purpose ; tho' more material to the present Dispute than the Constitution of Archbishop *Boniface*, inserted by him for no other Reason, than to make a groundless and unjust Reflection. If he meant it only as an Instance of Papal Incroachment, his Lordship has furnished him with many more Instances, and History would have afforded him much stronger and of greater Insolence : But because the learned Author, in his Preface, mentioned the reviving of obsolete Laws, where they might be of use ; he has picked out this as an Instance of one, recommended for that Purpose ; for “ he can't imagine with what other view it was inserted.” Is it thus he bears his Testimony ; is this the Effect of his Search after Truth without one single Expression to support it ? And would he insinuate to his Reader what he does not, cannot believe ?

In order to compleat this Work, it was necessary for the learned Author to insert *all* that might have any Reference to the several Titles, and not to take upon himself to judge, as to what use they might or might not be applied ; nor could he well have omitted so remarkable a Constitution upon the Head of Prohibitions, which being extracted from the Provincial Constitutions, was according to the Course of the Work to be inserted into the Text, and will serve as a History to that part of the Law. Nothing is more frequent in the *Code of Justinian*, than the Recital of former Laws, which were either originally faulty, or from the Unreasonableness of them afterwards altered or grown into Disuse. Neither is this Constitution entirely useless as to the Knowledge of the Law ; for how-

ever unjustifiable the Method of enforcing it was, yet this might be deduced from it, " That " when the King's Writ suggested any Temporal Cause whereon it was supposed to be grounded, the Ecclesiastical Judge might answer, that he took Cognizance of the Cause in a spiritual Way." And this was allowed to be Law in both Courts for many Ages after, viz. That they might proceed in the same Cause *Diverso Intuitu*, whatever Precedents there may since have been to the contrary,

Another use which it may be of, is, to convince this Writer, and all other the Church's Enemies, that there is no Ground to suggest, that they are now carrying *Church Power* to the Height of Popery: And may serve for a Lesson to all Jurisdictions, how prejudicial it may prove to themselves at last, to extend their Power too far: And may likewise be offered as a Preservative against Popery, whose Excesses ought not to be made an Argument against the legal Power of the Church of *England*. But to return to the Statute before recited, (24 H. 8. c. 12.) which is by all agreed to be declaratory of the Common Law of the Realm.

From thence it appears, 1. That the Church of *England*, or the *Spirituality*, are distinct and separate from the Judges or Ministers of the Temporal Laws, and not subordinate to them: For the King is the supreme Head, to which is united a Body Politick divided into *Spirituality* and *Temporality*.

2. That they have distinct Offices and Duties, and all Causes that come in question of the Divine Law, or *Spiritual Learning*, do appertain to the *Spirituality*.

3. That

3. That they are sufficient in themselves, without the Interposition of any exterior Person, to declare and determine all Doubts arising from the Divine Law or Spiritual Learning ; and to administer all such *Offices* and *Duties* as to their Rooms Spiritual do appertain.

4. That the Statutes made against the Papal encroachments in the preceding Reigns were not intended to abridge the Rights of the Clergy, but were made for the Conservation of the Spiritual as well as of the Temporal Jurisdiction, and of the just Prerogatives of the Crown.

To this I may apply Dr. Ridley's Observation, who speaking of several Statutes relating to Tythes, says, " That they do wrong to the Ashes of those deceased Kings, which by subtil Sense and strained Interpretations draw these Laws, which were intended for the Benefit of the Church and Church Government, to the Overthrow of the same, as tho' the positive Laws of the Kingdom could not stand, if the Laws of the Church continued and stood upright."

Lord Coke, in his Treatise of the King's Ecclesiastical Laws, takes notice of this Statute of Hen. 8, and recites several Species of Causes wherein the King administers Justice to his Subjects by the Hands of his Spiritual Judges ; " The Cognizance whereof, he says, do not belong to the Common Laws of Eng- 5 Rep. p. land, but are *exempted* from the Jurisdi- 9. cution of the Common Law," many of which have since been stopp'd by Prohibitions, or transferred to the Temporal Courts : But how that which is *Exempt* from their Jurisdiction, can be called *Subordinate* to them as *Supreme*, I must leave

leave the *Examiner*, who deals in Contradictions, to explain.

Cap. i.
§ 17.

*Ridley's
View, &c.*
p. 209.

The Stat. i. *Eliz.* which restored to the Crown the Regal Supremacy, will inform us wherein it consists, *viz.* " All such Jurisdictions, Privileges, Superiorities, and Preheminences, Spiritual and Ecclesiastical, as by any Spiritual or Ecclesiastical Power or Authority hath heretofore been or may lawfully be exercised." The Regal Supremacy then in Ecclesiastical Matters, cannot mean the Royal Power which is exercised in the Temporal Courts, but in the Ecclesiastical ; and I hope the *Examiner* will allow Dr. *Ridley's* way of Reasoning, as well when it makes against him, as when it serves his Purpose ; who says, " That those who go about to draw these Things into the Temporal Courts, as belonging to the Temporal Crown and Dignity, therein do wrong to the King himself, as tho' he had but one proper Jurisdiction belonging to his Throne and Seat of Majesty ; whereas they are equally united in him, and his Throne is no less stayed up by his Ecclesiastical Power, than it is uphelden by his Temporal Authority."

Pt. 2. p.
49.

I cannot give the Reader a truer Idea of this part of our Constitution, than from Sir *Hen. Spelman*, in his Treatise of *The Ancient Government of England*, who compares it to an *Arch*, and says, " That the Common Law is but the half Arch of the Government, tending only to the Temporal Part thereof, and not unto the Ecclesiastical." That he " cannot well present the one without the other, and must therefore take a Project of the whole Arch, that so the Strength and Uniformity in both parts may the better be conceived.

" As

" As therefore each Side of an Arch descendeth
 " alike from the Cone or Top Point, so both
 " the Parts of that their Government was alike
 " deduced from the King." The transferring
 then of the *Supremacy* in Ecclesiastical Matters
 to the Temporal Courts, is altering our Con-
 stitution, and weakening one of those Arches of
 Government which support the Crown.

Since therefore their Power under his Majesty
 is distinct, it might, without Offence, be
 wished, that their Bounds were certain and fixed:
 And as Doubts may arise in Relation thereto,
 that there might be a common Umpire to de-
 termine betwixt them. This is the Substance of
 what his Lordship has advanced, and is by this
 injurious Writer stiled, " an Affront to the
 " Justice of the Kingdom." It arises from a
 Recital made by the learned Author of the
Codex, of a Remark of the Lord *Coke* upon the
 before-mentioned Statute, " That the Kingdom
 " hath been best governed, and Peace and
 " Quiet preserved, when both Parties, that is,
 " when the Justices of the *Temporal* Courts, and
 " the *Ecclesiastical* Judges, have kept themselves
 " within their proper Jurisdiction, without en-
 " croaching or usurping upon one another." Exam. p.
 The Words *Encroaching* and *Usurping* are the
 Words of Lord *Coke*, and not of his Lordship.
 There is likewise an Account of the Complaint Praef. Cod.
 made by Archbishop *Bancroft*, who exhibited p. 19.
 Articles in the Name, as Lord *Coke* tells us,
 of the whole Clergy, 3 *Jac. I.* complaining of
 the Grant of Prohibitions, wherein it was in- 2 Inst. p.
 sisted, " That all kinds of Prohibitions, being 601.
 " Original Writs, ought only to issue out of
 " the Chancery, and neither out of the King's
 " Bench nor Common Pleas. [The Exchequer
 was

was not then so much as thought of.] To which the Judges replied, “ That it was what by Law they ought to do, and always had done, and which by Oath they were bound to do. But if it be holden inconvenient, and they can in discharge of us obtain some Act of Parliament, to take it from all other Courts than the Chancery, they shall do unto us a great Ease.” What is his Lordship’s Observation hereon ? To censure the Answser of the Judges? No : He does not take upon himself to determine between them, but only thinks it a Pity they were not discharged of the Burden ; and then proceeds to show the Equity of such Discharge. Is it an Affront to the Veracity of these great Men, to believe them when they say, *It is a Burden?* Or is it an Affront to their Understanding to think they should *desire to be eased of it?*

Exam. p.
44.

A Man must be very little acquainted with the History of our Laws, who can believe what the *Examiner* insinuates, that the Proposal of Prohibitions being restrained to the Court of Chancery, arose from Archbishop *Bancroft* and the Clergy, so late as the Reign of K. *James I.* when the sole Right of that Court’s granting Prohibitions had been insisted on before and after the Time of the Reformation.

18 Ed. 3. The Clergy complained that Prohibitions were granted in Causes where the King’s Courts could not give Redress ; and the Words of the Statute made upon their Petition 18 Ed. 3. are, “ That no Prohibition shall be awarded cap. 5. “ *out of the Chancery*, but in case where we have the Cognizance, and of Right ought to have.” If the Chancery had not then been the only Court from whence Prohibitions

tions issued, what relief had this Restraint been to the Grievance complained of?

50 Edw. 3. The Clergy petition in Parliament, that no Man shall have any Prohibitions, unless he do bring to the Chancellor the Libel sign'd with the Judges Seals before whom it is hanging, for the more Perspicuity thereof.

17 Ric. 2. Sundry Towns of the West Part pray Remedy against the Officers of the Admiralty, for holding Plea of *Matters determinable at Common Law*. The Answer which was given to their Complaint and Petition will show, that the Courts at Common Law did not at that time claim an Original Right of Prohibitions in such Cases, but that the Chancellor was to judge between the two Jurisdictions. *Resp.* The Chancellor, by the Advice of the Justices, upon the Hearing of the Matter, shall remit the Matter to the Common Law, and grant Prohibition.

In the Beginning of the Reign of King Hen. 6, Humfrey Duke of Gloucester being Keeper of England, the Commons complain in Parliament, That having sold Wood of 20 Years Growth and upwards, the Merchants who had bought the same were sued for the Tythe, and when they applied to the Court of Chancery for a Prohibition upon the Stat. 45 Ed. 3, they were refused : " Wherefore they humbly desired the King to ordain by Authority of the present Parliament, that such who may find themselves grieved may hereafter have such Writs of Prohibition, and upon that Attachment, as well in the Chancery as in the King's and Common Bench at their Choice. And that the said Writs of Prohibition and Attachment issuing out of the said Benches, have " the

Cotton's Abr. Records, p. 140. n. 198.

Cotton's Abr. p. 356. n. 48.

Fuller's Ch. Hist. lib. 4, p. 175. Ex Arch. Turris London.

Cotton's Abridg. Records, p. 600, n. 44. 9 H. 6.

" the said Force and Effects as the Original
 " Writs of Prohibition and Attachment so issued
 " out of the Chancery of our Lord
 " the King. To this it was returned, *The*
 " *King will be advised*; the civillest Expression
 " of a *Denial*." The Doctrine at that time
 was, that altho' Timber-trees were by the Sta-
 tute freed from Tythe, yet the Buyer was sub-
 ject to the Payment of a personal Tythe: And
 here we find, not only that the Court of *Chancery*
 had the Right of granting *Prohibitions*,
 but an *Act* to give the other Courts a Concur-
 rency is refused.

Cotton
Libr. Cle.
opatra, T. n. 10.
2. Stryp.
Whitg. p.
54.

In Archbishop *Whitgift's* Time, at the latter
 End of Queen *Elizabeth's* Reign, several Points
 were laid before the Lords of the Council and
 the Judges to consider of, in relation to the
 Grant of Prohibitions, which were of the same
 Nature with the Articles exhibited by Arch-
 bishop *Bancroft*; and amongst others it is said,
 " It seemeth by the Scope and Purport
 " of the most ancient Statutes in that behalf
 " provided, that the *Prohibitions* and Consul-
 " tations, as other ordinary Writs, ought not
 " to be granted, but in the Court of *Chancery*
 " by the Lord Chancellor of *England*. And
 " howsoever of later Years the Course hath
 " been drawn another way, yet no doubt the
 " Power of the *Chancery* is not any whit
 " thereby restrained, but that he lawfully may,
 " and it were to be wished he would, resume
 " and put in Execution his ancient Right
 " and Authority. So should not her Majesty's
 " Ecclesiastical Jurisdiction be driven, as now
 " it is, to admit the Censure and Judgment
 " of those, who indeed be principal Parties,
 " as touching the Question of *Prohibition*."

But

But the Queen and the Archbishop dying soon after, this Point was renewed in the next Reign. Yet the Complaint of Archbishop *Ban-roft* is represented as made with a self-interested and ambitious View, and the Ashes of that most reverend Prelate are to be disturbed by Exam. p. the Censurer, as only aiming at *Church Power*, 44. whilst it is insinuated, with his usual Candour, that an Imagination of Clergymens being again at the Head of the Court of Chancery might be the Inducement why the Power is chose to be lodged there. Base Insinuation! No; they may be thankful for the Rules of Equity received from them, upon which other great Men have built: It was the Rights of the Church and the Prerogative of the Crown which he had at Heart, suitable to the Expectations of the great Queen *Elizabeth* who advanced him to the Mitre, and the good Archbishop *Whitgift* who zealously recommended him.

But to put the Scheme of Church Power out of the Question, let me observe that the same Complaint was made five Years afterwards by the Lord High Admiral of *England*, upon account of Prohibitions to the Court of Admiralty. I don't find that any of the Admirals had Expectations of having the Seals, or that even the Pope himself ever laid claim to that part of his Majesty's Prerogative which relates to the Dominion of the Sea: And tho' the Pretence of being St. Peter's Successor, and using the Seal of the *Fisherman*, might as well have entitled him to a Marine Jurisdiction, as to any other Authority in these Realms; yet the King's Prerogative was never interrupted by him or his Legates in administering Justice in his Courts of Admiralty.

Yet,

4 Inst. C.
22, p. 134.
8 Jac. 1.

Yet, as if all Prerogative were Popery, and those who exercise any Power under his Majesty, unless in Subordination to the Courts at Westminister-Hall, were Popes at our own Doors: The Admiralty Jurisdiction has met with the same Fate as the Ecclesiastical, from Prohibitions, and is well nigh extinct: The Vice-Admiralty Courts are shut up, and a few poor Mariners Causes are the chief Branch which is left in the High Court of Admiralty.

The Lord High Admiral, among other Things, complained of those Fictions of Law which stripped him of his Jurisdiction under his Majesty: Fictions contrary to Nature, and even beyond Poetical Licence, or the Painter's Imagination. *Delphinum sylvis appingit, fluctibus Aprum*: A Ship is under sail in Cheapside to make a Contract at Land, or found an Action of Trover.

If the Locality only gives a Jurisdiction, and not the Nature of the Cause as a Marine Affair, arising from the Sea; may we not be apprehensive, that by the same Rules whereby other Prohibitions are granted to the Admiralty, his Majesty's Power of manning his Fleets, in the Time of need, by Warrants from the Lord High Admiral for impressing Seamen, at least upon Land, or upon the Streams of Navigable Rivers, between the extreme Points of Land, may not be impeded, and the Realm left defenceless?

The Consequence of this may be worth the Consideration of those at the Helm; and I may again refer to Dr. Ridley upon this Point,
 " That to restrain either of these Jurisdictions
 " to their own Place, and to provide that one
 " in his Greatness do not swell up against the
 " other,

“ other, the Law has set Bounds and Limits
 “ which they shall not pass ---- For that the dimi-
 “ nishing of either is a Wrong to the Prince
 “ from whom they are derived, who is no
 “ less *Lord of the Sea* than he is *King of the
 “ Land.*”

The Tryal by Juries is certainly well adapted to the *English* Constitution in many Cases, but it is not to be the only Method of Tryal; for by *Magna Charta*, “ It is either by the Judgment of Peers, or by the Law of the Land:” And the Method of Tryal in the Courts of Chancery and Exchequer, of Admiralty, Chivalry, and the Ecclesiastical Courts, in Matters belonging to their Cognizance, is as much the Law of the Land, as a Tryal by Juries. And Experience frequently shows us, that where the Rights of the Crown, or of the Clergy, are concerned, they do not meet with the same fair Consideration from a Jury, as in other Cases: And the Reason is evident; on the one Side it may prove to be their own Case, on the other it never can.

Where Doubts arise in relation to the Bounds of Jurisdiction, it is necessary that there should be an Umpire to determine them, otherwise the Subject would be harassed between two equal independent Powers; but where that Umpirage is to be placed is the Question, Whether in those Courts which may thereby draw the Cognizance of Causes prohibited to themselves, or in one which can have no Increase of Power or Advantage thereby.

It is admitted by the *Examiner*, “ That if the Right claimed by the Temporal Courts of granting Prohibitions implied the Power of enlarging their Bounds at Pleasure, the Ab-

c. 29.

P. 41.

" surdity would be as great as his Lordship
 " endeavours to represent it. But that the
 " Bounds are settled by Law and immemorial
 " Custom, to which the Judges are bound by
 " Oath." And that " Power and Right in a le-
 " gal Sense are the same."

p. 42.

Tho' Power and Right may be the same in Law, yet in this Case it is begging the Question, or resolving all into Power; since the Right was the Point in dispute: There may be a Power in fact only; and all parts of our Constitution have at times both known and felt it. The Power of the Pope, the Power of the Protector, and the Power of dispensing with all Laws, have been so severely felt, that it may make us sensible of our present Happiness under his Majesty, where Power and Right are the same: And as the Prerogative of the Crown is only made use of to preserve and maintain the Liberty of the Subject, so the Liberty of the Subject ought in no branch to be made use of, to the diminishing the just Prerogatives of the Crown, under whose Authority all Jurisdiction is exercised.

If the Right in this Case ought only to be considered, it is then immaterial whether the Judges acted upon Oath or not. For was ever such a thing known as one of the *Claimants* to be made a Judge of the *Claim*, upon his own Oath that he would do Right? I am satisfied that those great Men would not, either in their publick or private Capacity, do what they thought the least Injustice to any one if they were not upon Oath: But the Reason why the Law prohibits any one to be Judge in his own Cause, is not that it suspects his Integrity, but lest his *Judgment* itself should be biased. The greatest

greatest Peer of the Realm cannot be Witness for himself, not upon an Imagination that he would forfeit his Honour to increase his own Power or Profit ; but *Facile credimus quod volumus*, we are naturally inclined to judge most favourably on our own Side, whilst we act with the greatest Integrity.

Are then the Bounds of Jurisdiction settled by Law or immemorial Custom ? By *Law* I presume the *Examiner* means written or Statute Law, as distinguished from Custom or immemorial Usage. If by Statute, there is no need of Custom, for that is sufficient ; nor ought Custom to set it aside. The Ecclesiastical Jurisdiction is described by the 24 Hen. 8. The Admiralty by the Statutes of *Richard* 2. and *Hen.* 4. to Things done or arising upon the Sea, as in the Time of *Edw.* 3. Whatever then is allowed by these Statutes, Custom or Usage can't take away. The Laws of *Oleron* were at that Time in use, and may show in some Measure how much more extensive the Admiralty Jurisdiction was, than now it is.

But the Prohibitions complained of are those which are said to arise from Custom, that is, from Precedents and the Determination of the Judges. These where they are ancient and uniform may be a Proof of immemorial Custom : But where the more ancient Rules and Usage of the Courts have been different from the later Determinations ; where the same Court at different Times have been of different Opinions ; where not only the Judges of one Court have been divided among themselves, but one Common Law Court upon the same Point differs from another, as Variety of Instances may be given ; to found immemorial

Usage or Custom thereon, so as to deprive another Jurisdiction of that Right they were in Possession of, is not conformable to their Determinations in other Cases, especially that a latter Usage should controul a former which is more ancient. Besides, if Precedents make the Law, and the Courts *make* Precedents, it is giving them a legislative Power,

If the *Examiner* had argued without Reflections, without forced and malicious Inferences against his Adversary, these are Points which every *British* Subject has a Liberty of enquiring into. But as it is not his Lordship's Opinion, but his Reputation, his Honour, his Integrity is attacked, it will be an Excuse for me in treating him more freely on this Head, which I would otherwise have avoided; and unless he appears well founded in every Point, the Reflection will turn upon himself.

Is it plain then, that altho' the Law has fixed the Bounds of Jurisdiction, they are unsettled by Precedents, and does it not show the Equity of having a common Umpire? I shall assign some Reasons therefore why his Lordship should chuse the Court of Chancery.

First, It is the *Officina Breuum*, from whence Original Writs issue, and from whence, it is not denied, that originally these Writs of Prohibition did issue; and if confined to that Court it would prevent the great Variety of Determinations, and the Increase of Prohibitions, which according to the present Course must necessarily in Time swallow up the Remains of every Jurisdiction that is subject thereto; and this not from any Imputation on the Judges, but from the natural Consequence of different Opinions, which will happen among the greatest Men. If

Rules

Rules which may have been applied to a particular Case, shall be extended to all, and contrary to the Maxim *Non ex Regula Jus sumatur, sed ex Jure quod est, Regula fiat*; the Rule shall make the Law, and not the Law the Rule, If a Precedent once made by Judges who might be too favourable to their own Jurisdiction is to govern those who come after, and from an erroneous Practice shall become the Law of the Court, this Extension of one Jurisdiction must necessarily diminish the other. Under the Force of Precedent, what are already become of all the inferior Courts of the Kingdom, where Justice was heretofore administred nearer home, and at an easier Rate? Are they not almost all absorbed by the great Ocean, whilst those smaller Streams of Justice are left dry?

Where Consultation is once duly granted, the Law has directed there shall be no new Prohibition unless the Libel be alter'd. Where a Prohibition is denied, and the Rule discharged, it has the same Effect as a Consultation. If this were confined to one Court only, it can't be presumed the same Judge would alter his Opinion; but if they may go from Court to Court, and after it has been denied by one, without any Alteration of the Libel, it may be granted by another, Variety of Judgments may more easily happen, and the Judgment of one Court be revers'd by another, which is its Equal. Whereas if a Prohibition be granted by one, they cannot apply to another to discharge it. But further, it has been observed, that when a Rule is granted in one Court, there must be a Majority of the Judges of that Court to discharge it, otherwise it is binding. When that Majority has discharged it, the Party applying

for a Prohibition may go to the next; and when discharged likewise by a Majority of that Court, proceed to a third; and an equal Number there shall fix the Prohibition, and thereby take away the other's Jurisdiction. Are the Suitors in this Case upon an equal Foot? If the Law, as many are apt to imagine, be a Lottery, let those who understand it compute the Chances, from the natural Variety of human Judgments, in disputable Points, amongst Men of the greatest Judgment, Learning and Integrity, and consider the Odds against all those which the *Examiner* calls *subordinate Jurisdictions*. Two Judges out of twelve may stop their Proceedings, whilst nine are required to discharge the Prohibition. Is it possible that any Jurisdiction can long subsist under these Difficulties?

A second Reason may be, that there are some Rules received in the Courts at Common Law in relation to the Grant of Prohibitions, which might not be approved of by the Court of Chancery, as a common Umpire between both Jurisdictions. It is an allowed Rule in Law, that the Cognizance of the Accessary shall follow the Nature of the Principal; and therefore if a Marriage, which is undoubtedly of Ecclesiastical Cognizance, arises incidentally in any Cause of Temporal Cognizance, it shall be tried by a Jury; and anciently the same Rule was allowed to the Spiritual Courts, *Non est consonum Rationi quod cognitio accessorii in curia Christianitatis impediatur, ubi cognitio cause principalis ad forum Ecclesiasticum noscitur pertinere.* Notwithstanding this, if a Temporal Incident arises in a Cause before the Ordinary, it is now become a Ground for a Prohibition, as in Customs relating to Ecclesiastical Matters

Regist.
fol. 5.

in

in Causes of Tythes, &c. and other such like Incidents ; and an ingenious Distinction is made, not *ob defectum Jurisdictionis*, but *ob defectum Trialis*, as if the Incident might not be tried in the same Manner as the Principal. Thus Church-Wardens Accounts, which are certainly incident to Causes of Rate, and the Causes relating to the Repairs of the Church, which were always thought to be properly before the Ordinary, are prohibited ; and I don't see that the Temporal Courts have as yet any known way of giving Redress themselves ; but it may in those Cases be hoped they will find one, or else the Subject may be injured and not find a Remedy in any Court. Where is the Equity that the same general Rule should have a different Interpretation, as it either relates to our selves or others ? Was not this Alteration enlarging and extending their Bounds at Pleasure, which is the Absurdity complained of ?

Again, in the Interpretation of Statutes, it is a received Rule, that where a Jurisdiction is given to any other Court, which did belong to the Temporal Courts, *their* Jurisdiction is not thereby taken away without express and positive Words ; and the same Rule was allowed to the Ecclesiastical Courts, as I have already mentioned from Lord Coke as a settled Maxim allowed in all their Books ; yet what Numbers of Prohibitions have been granted upon a different Rule, that unless there be a saving Clause in the Statute, the Ordinary's Power is taken away ? And this more particularly in the Punishment of Vice ? Can it be presumed to have been the Design of the Legislature, that when the Frequency and Increase of Vice called for further Punishment, they intended, without ex-

*Coke 5
Rep. p. 5,
6, of the
King's
Eccles.
Laws.*

pressing it, to take away that Power which might not be alone sufficient, and substitute another perhaps less effectual, or not rather that either might punish in their own Way?

Another Point in which an Alteration might be hoped for is, the Time of applying for a Prohibition, which is to be granted upon the View of the Libel. It is frequent for a Defendant to join Issue in the Cause, proceed to Sentence, take his Chance (either from the Defect of Proof or otherwise) of being dismissed with Costs, or else to appeal and try another Sentence; and if he fails after all this to obtain a Prohibition, whilst the Plaintiff can have no Redress for his Expence or Loss of Time. Exceptions to a Jurisdiction is generally the first Step, and should be made *in Initio Litis*; and it is too great an Advantage on one Side, to try the Opinion of that Court, whose Authority he afterwards denies.

3. That it should be confined to one Court, is more for the Benefit of the Subject, which is principally to be considered; for the Law was made for the Subject, and not the Subject for the Law. However beneficial the Uncertainty of the Law may be to the Practicers in any Courts, the Subject suffers for it. Great is the Expence in settling Precedents; and it is but little Comfort to a Man, after spending a great Part of his Estate, only to have his Name quoted in another Case. It cannot be for the Subject's Advantage to have all the Causes in the Kingdom brought into *Westminster-Hall*, which must be the Effect of destroying the other Jurisdictions; and every Cause which is brought from another Jurisdiction must create an Uncertainty until it is adapted to the Rules of Common

mon Law, to which it was before a Stranger. This is much stronger in Admiralty Causes, wherein Foreigners are concerned, and whose Rules are better known to them. Justice is equally due in small Matters, as well as in great ; and if the Superiority the *Examiner* contends for were to take place, not only the Prerogative of the Crown would be lessened by blending all Jurisdiction, but the Pursuit of Right would be too expensive in Matters of less concern.

By the Laws of King *Edgar*, the King might not be troubled with ordinary Matters, “ Nemo *Lamb.*
 “ in lite Regem appellato, nisi quidem Domi *Archæol.*
 “ Justitiam consequi aut impetrare non poterit ;
 “ sin summo Jure Domi urgeatur, ad Regem, *LL. Ed-*
 “ ut is onus aliquâ ex parte allevet, provocato.” *gari, 2.*
p. 63.

The preserving the Bounds of Jurisdiction distinct and separate, is for the Ease of the Subject, that he may know with greater Certainty to what Court to apply, and not be carried about from Court to Court, in quest of the proper Seat of Justice, whilst the poor Client, like *Syfibus*, having forced his Stone with the utmost of his Strength up to the Top of the Hill, finds his Labour renewed by its rowling down again upon him, and the Cause, which he well hoped was near at an End, stops, *only* to begin again. The leaving then the Determination thereof to one Court rather than to many, as it must be attended with less Variety of Opinions, will make it more certain, especially if that Court receives no Increase of Power by its Determination.

This Complaint against Prohibitions was made, the *Examiner* says, in the weak Reign of *James I.* And what was the Effect of it, in that weak Reign ? No Regard was had to it ; his

p. 161.

his Prerogative, his Supremacy, is not worth this wise Prince's Care ; and Dr. Ridley complains to him, " That where there are two divers Jurisdictions in one Commonwealth, unless they be carefully bounded by the Prince, and an equal Respect carried to both of them, so far as their Places and the necessary Use of them in the Commonwealth requires, as the Advancement of the one increaseth, so the Practice of the other decreaseth, especially if the one hath got the Countenance of the State more than the other, which is the only Cause at this Day of the Overflowing of the one, and the Ebbing of the other ; but it is in his Sacred Majesty to redress it, not by taking any thing from that Profession that is theirs, but the restoring to this Profession that which is their own."

I hope then that upon this Head the Censurer will miss his Aim, and what was meant for the Support of the Prerogative of the Crown, and fixing the Supremacy upon its true Basis, as also for the Subject's Ease, will not be thought to be an Affront to the Justice of the Kingdom, or to border very near on a Libel on our Constitution, by any Person who has a Regard for the Rights of the Crown or the Good of the Subject.

Exam.
J. 43.

The next Point which his Lordship, or rather the Legislature, is censured for asserting is, " The Knowledge, Sufficiency, and Integrity of the Body Spiritual or the Church of England, without the intermeddling of any exterior Person in all Matters where any Cause of the Divine Law or Spiritual Learning shall come in Question, and the Administration of all such

" such Offices and Duties as to their Rooms Spiritual shall appertain." And the Corollaries or Conclusions which his Lordship has deduced from thence are stiled --- *Aiming at a Monopoly* p. 66. *of Power in the Clergy* --- *a Diminution of the High Court of Parliament*, --- superseding the undoubtedly *Principles of the Law and Acts of Parliament* too --- derogatory to the King's Prerogative, and repugnant to the known Laws of the Land ---- inconsistent with the *Act of Submission*.

This is a heavy Charge ; these are hard Expressions, and ought to be well grounded : But if this be raised only from false and forced Constructions, from Principles destructive of the Church of *England*, derogatory to the Prerogative Royal, and contrary to the Laws and Usage of the Kingdom ; he will then be found a false Witness and an infamous Detractor.

His Lordship upon every Occasion throughout this Elaborate Work, has in the strongest Terms asserted his Majesty's Prerogative and Supremacy, has claimed the Exercise of no Jurisdiction but in Subordination to him only, and according to the known Laws of the Land and not otherwise. There is a general Misrepresentation thro' the whole Course of the Examiner's Argument of those Words of his Lordship, " That the present Rule of Government and Discipline in the Church, are the Laws in being of all Kinds." Thus, he says, " If Experience did convince us that the Spirituality are blessed with a superior Knowledge and Experience of the Laws in being of all Kinds ---- of the Common Law Reports, (a Library of themselves) ---- let me add, of the Body of the Civil Law." ---- As if a thorough Knowledge of all the various Branches

of the Laws enumerated, was necessary towards a compleat Understanding of those Rules by which the Church is governed ; as if Tenures and Crown Law was a necessary Part of their Study : When in common Sense and Meaning it implies no more, than the Knowledge of the Laws relating to that particular Subject ; which altho' too extensive, as all our Laws are, yet the present censured Work may convince any unprejudiced Person that its learned Author had attained thereto, at an early Age of Life, without interrupting those Studies whereby our Holy Religion has by him been with so great Strength defended. But how the *Body* of the Civil Law came to be necessary I can't imagine, since the Laws therein which relate to the Government of the Church have by the Compilers thereof been transferred into the Body of the Canon Law.

The learned Author, in reciting the Series in which he had placed the several Laws, having before spoken of the Bishops Power by the Word of God, tells us, “ The Statute Law, “ tho' reckoned first in point of Authority, “ comes properly in the last Place when con-“ sidered as part of the Ecclesiastical Law of “ the Church of *England*. ” Here the *Examiner* observes, “ That he always esteem'd the “ Common and Statute Law as the best, if not “ the only *Establishment*, on which any Auth-“ ority can stand in *England*, and is scandalized “ at the Expression of the *additional* Strength “ of Common and Statute Law. ” His Lord-“ ship has reckoned the Statute Law first in point of legal Authority, and placed it last, as it controuls all others : But to say that the Statute and Common Law is the *only Authority*, is derogatory

tory to the King's Prerogative and Supremacy : For the Bishops and Clergy in Convocation assembled by virtue of the King's Writ, are enabled to make Laws Spiritual for the Government of the Church, which being ratified by the King, have a legal Authority in Matters Spiritual. And as the Canons of the Church of *England* had not their Original from the Common or Statute Law, but were derived from the Apostles and from the Primitive Church, from the four first General Councils, and from such Constitutions as under the Authority of the Crown have been made by the Clergy here ; those may properly be called an additional Strength. And the *Examiner* forgot one Authority, *viz.*, the *Divine Law*, which had not its Original nor has its Authority from either of the Laws he mentions, and which is certainly the Best, and ought to have some weight amongst the Laws of this Kingdom. What he is scandalized at is, that it should be in the Power of the Crown, by virtue of its undoubted Prerogative, to ratify and confirm such Laws and Canons as have passed both Houses of Convocation ; which is a direct Infringement of the Regal Supremacy in the King's Legislative Capacity, as the fixing of the Supremacy in *Westminster-Hall* was in his Judicial.

It cannot, I believe, be denied by any one, that the present Members of the Body Spiritual are, in every view, at least equal to those who at the Time that Statute was made, in general composed that Body ; in Purity of Religion, Piety, Loyalty, Exemplariness of Life, Learning, Compassion and Tenderness towards those who thro' unhappy Scruples divide from them, How can they then be thought less sufficient either

either for Knowledge or Integrity for the Administration of all such Offices and Duties as belong to them? If there are any who for neglect of their Duty, for Vice or Immorality, are unworthy of their Function; if any who are under their Care deserve not the common Name of Christians; that is his Lordship's Complaint, that the Power of the Church is restrained from cutting them off from its Communion; that is the Power he does desire, *the Unquiet, the Disobedient, the Criminous to correct and punish.* Yet this we are frequently told would in many Cases be an Incroachment on the Temporal Power, either to enquire, or to correct.

The *Examiner's* Objections will naturally lead me to consider the Sufficiency of the Body Spiritual in their several Rooms or Capacities. 1. In their legislative Capacity, as the best Judges of what Laws are most proper for promoting of Religion and the Good of the Church, as also of what Assistance it stands in need of from the State. 2. In their prudential Capacity, as the best Assistants to the Prince in the Administration of all Affairs which concern Spiritual Persons or Things. 3. In their judicial Capacity, as the proper Province to which the Law has allotted the Suppression of Vice and Immorality by Spiritual Censures, and according to the Laws of the Church.

A Man must indeed be a Stranger to our History, and utterly unacquainted with our Laws and Constitution, who does not know that there are two Legislatures, *now subsisting amongst us;* the one which is Supreme and General, called *the Temporal,* in Distinction from the other which is called *the Spiritual,* without any Diminution

Diminution to the former: And, that these two have been assembled for different Ends, as often as the Exigencies of the Church or State required; and that the one has not ordinarily intermeddled in the proper Business of the other. And no one can censure his Lordship in this Point without diminishing the Prerogative of the Crown, which is the Head of both.

The Interests of the Church, and the Good of Religion, are so interwoven with the State, and so essential a Part of it, that the supreme Legislature must and have at all Times taken it under their Care and Consideration, and have made Laws for the Good of both, consistent with their Duty to God, and the Temporal Welfare of these Realms: Their Power *the Law* has not, cannot restrain; but it is left to their Consciences, as they will hereafter answer to God for the Trust reposed in them: And the straining of any Expression of the learned Author to the Diminution of their Authority, is injurious to him, and founded in Falshood and Malice: For that, notwithstanding this general Power, there is likewise a Legislature in Matters Spiritual where the Convocations of the Bishops and Clergy, assembled by virtue of the King's Writs, have a Power to make Laws, which being duly ratified and confirmed by him, are as binding as any other Laws: And whenever any Matter of Divine Law or Spiritual Learning hath come in Question, it hath by the Constitution and known Laws of the Realm been left to their Determination and Direction.

The *Examiner* can give no Instance where the Temporal Legislature ever *primarily* took under Consideration any disputed Points of Religion: Our Articles, our Liturgy will not be said to have

Exam.
p. 71.

have been drawn up, and settled by the Laity ; nay even the Acknowledgment of the King's Supremacy, (tho' with a strong Opposition amongst the Popish Clergy) was first made in Convocation before it was recognized in Parliament. As to the Act of Uniformity he mentions, against which all the Bishops protested, an incautious Reader might be led to imagine, that there had been only one Act of that kind at the Beginning of the Reformation, and that it had been opposed by all the Bishops in Parliament : He ought therefore to have been so ingenuous, tho' it had hurt his Argument, to take notice, that the *Publick Liturgy of the Church of England* had before been confirmed in Parliament, 5 and 6 Edw. VI. to which the Bishops were consenting. This Act was repealed in *Mariae*. The Persecutions of that Reign are too well known, and the Spirit of the Bishops made by her : But when Queen *Elizabeth* came to the Throne, in *Eliz.* this Act was repealed, and the *Liturgy* was again restored, the same as had been in King *Edward's* Time, excepting some few Alterations. This Repeal and Confirmation the Popish Bishops opposed and protested against ; but it cannot with any Colour of Truth be pretended, that the Alterations in the *Liturgy* were made by the Parliament, or prepared by the Laity ; or that they at either Time otherwise interposed, than by approving, confirming and establishing what had been before prepared and was laid before them. The Reformation was so far from being conducted altogether by Lay Councils, that it was begun and carried on under the Royal Supremacy by the Clergy, who were our first Reformers, and who conducted and settled all Points

Points in Religion, which, as oft as there was Occasion, were afterwards confirmed and enforced by the Authority of the Temporal Legislature,

The Power of the Spiritual Legislature is confined to Matters Spiritual, nor can their Sanction extend to what is merely Temporal; not that they are debar'd from inquiring, debating and considering of any thing Temporal which may concern the promoting Religion and the Good of the Church; not indeed in an authoritative Way, as in others; but the known and ancient Method hath been for the Convocation in such Cases to petition the King and Parliament for their Assistance, and to leave it to their Direction. If then his Lordship has submitted to them any Matters of a Temporal Nature, if any of those which the *Examiner* calls his Candidates are such, or even "the Improvement of our Constitution and the Amendment of the *Laws in being of all Kinds*, as far as concerns the Church, her Power, and Privileges, as the Subject of synodical Enquiry and Debates;" it is unjustly said to be contrary to the Act of Submission, or a Diminution of the Authority of the Parliament; since in all Matters Spiritual they have, under his Majesty's lawful Authority, a legislative Power; and in all Matters Temporal which relate to the Church, they, as his Council Extraordinary in Ecclesiastical Affairs, may address his Majesty or petition the Parliament, and are, as such, the best Judges of what Assistance the Church stands in need of from the State.

Judge *Hales*, in his Analysis of the Law, tells us that "the King's Extraordinary Councils are of two Kinds, 1. Secular and Temporal.^{p. 8, 9.}

" 2. Ecclesiastical or Spiritual. The King's Extraordinary Councils Secular are the House of Peers and the House of Commons. The extraordinary Ecclesiastical Councils are the upper and lower House of Convocation."

p. 11. " The King's Right of Dominion or Empire (amongst other Powers) consists, in making Statute Laws or Acts of Parliament: For tho' the King cannot make such Laws himself without the Consent of both Houses of Parliament, yet no Law can be made to bind the Subject without him. 2. In making Ecclesiastical Laws or Canons Ecclesiastical, which if kept within the Bounds of Ecclesiastical Cognizance, are admitted here within this Kingdom. As these Laws cannot be made without the King's Consent, so neither can the King ordain such Laws, without the Clergy in Convocation assembled."

Wales's State of the Ch.

p. 87.

If we may rely upon the Opinion of the present Archbishop of Canterbury, he says, " I have freely professed, and I still do declare it; that tho' the Law of *England* has, as I conceive, put the whole Power of assembling our Convocations into the *King's Hands*, yet it was with a Supposition that he would use that Power to the Good of the Church and Realm, which intrusted him with it. That in order thereto, he is obliged, both as a *Christian* and a *King*, not to hinder our Bishops and Clergy from meeting and acting whenever it should be for the Benefit of the Church so to do: And that in judging of this he ought to have a special Regard to the Advice and Requests of the Fathers and Governors of the Church; and not lightly refuse them the Liberty of convening, as often

" as

" as they shall humbly desire it of him." The *Examiner* tells us, " That it is owing to the Wisdom of the Administration, and its tender Regard to the Clergy, that their Attendance in Convocation has been so happily dispensed with for some Years past ;" yet, from the same tender Regard for them, when his Majesty shall see Occasion, he may require their Attendance, at least that they may not be looked upon as Strangers to our Constitution.

*Exam.
p. 62.*

The Clergy of this Realm, not only the Prelates, but likewise the inferior Clergy by their Proctors, were heretofore summoned to Parliament, and (notwithstanding the Opinion of some to the contrary) had a Voice of Assent therein ; and the Ch. his Grace informs us of the Difference between the Parliamentary Convention and the Provincial Convocation : " Thus much, says the *Examiner*, p. 65. &c. p. 54. Archbishop, I may affirm, that it was always accounted the proper Right of the Clergy, in their own Provincial Synods, and not in their Parliamentary Convocations, to make Ecclesiastical *Canons* and *Constitutions*. That the Provincial Convocation was (within its own Bounds) a complete Ecclesiastical Assembly, and acted by its own Ecclesiastical Power and Authority. --- The Clergy were therein tied up to Ecclesiastical Causes and Things." And he gives " an Instance from the Acts of Convocation 1452, when Regist. Tho. Kemp. Arch. Cant. act. Conv. Feb. fol. 219, &c. asked by the Archbishop whether he had any Thing

" Thing to propose in behalf of the Clergy,
 " which needed Reformation in the Church of
 " England, instanced in many Things in a
 " learned Oration he made thereupon: And
 " being commanded by the Archbishop to put
 " them in Writing, and so tender them to the
 " Fathers; they came to this Resolution con-
 " cerning them, *That forasmuch as those Things*
 " *which needed Reformation in the Church of*
 " *England, concerned the King's Majesty, and*
 " *the Laws of the Realm, and so were not at*
 " *all subject to the Definition and Sentence of the*
 " *said Council, the most Reverend the Arch-*
 " *bishop, and the Right Reverend the Bishops*
 " *there present, should be intreated in behalf of*
 " *the Clergy, effectually to press the King, with*
 " *the Lords and Commons, for a Reformation*
 " *of them in the Parliament, which was in a*
 " *a few Days after to begin at Reading. And*
 " *four of their House were pitch'd upon to sollicit*
 " *and inform the Archbishop, Bishops, and Pre-*
 " *lates, concerning the Affairs to be reformed in*
 " *Parliament.*"

Thus may we see the Beauty and Symmetry of our Constitution, whilst each Part has its own proper Function and Capacity, without interrupting or interfering with, but assisting, each other. It is no Diminution then to the Authority or Wisdom of our Temporal Legislature, to be assisted by the Spirituality in that which is *their* proper *Province*, whilst They employ their great Talents and Abilities in enquiring into the different Interests of Nations and Kingdoms, the State of Peace and War, the Leagues with Foreign Princes, the Defence of the Nation by our Fleets and Armies, the Supporting the Honour and Dignity of the Crown, the Improving

Improving of Trade, the Promoting of Industry, and in all that extensive Field of Knowledge, on which our Temporal Welfare depends. Why should they disdain that in their publick Capacity, which is their Practice in their private, of being instructed in Points of Religion by those who are set apart for that Duty ? Whilst then the *Lay Elders* are charging our Church with aiming at Independency, it is only to promote one more absolute amongst themselves : For I would ask, Wherein is the King's Supremacy allowed in any Part of their Religious Worship ? Have they not in spiritual Matters the Government of their Congregations independent of any Temporal Power ?

But the *Examiner* says, " What if the Clergy " should themselves be corrupt, and such they " have been." But thank God, his utmost Malice cannot charge it upon them now ; their Religion is unblemished, their Loyalty unsuspected, their Lives exemplary ; whilst the present Danger is from the *Libertinism*, both in Principle and Practice, destructive of all Government, both in Church and State.

To put this in another View : Would the *Examiner* say, that he is an Enemy to our Constitution, who should wish, that all Bills relating to the Practice of the Law and the Temporal Courts, were to be first liked and approved of by the Judges ? We know that it is usual for the House of Lords to command their Advice, and even to direct them to prepare the Bill ; and for want of this we have seen Bills intended to prevent Delays, and lessen Expence, and to render the Law more certain and plain, have no other Effect, than to multiply Suits, and create Confusion.

I may now consider the Message of Queen Elizabeth to the House of Commons, 22 May 1572, for which that great Princess has been indecently reflected on by some ; and for reciting whereof the *Examiner* has drawn such hard Inferences against our learned Author : “ *That her Majesty's Pleasure is, that from henceforth no Bills shall be preferred or received into this House, unless the same should be first considered and liked by the Clergy.* ” How far the Crown's signifying their Pleasure in this manner would now be looked upon as Parliamentary, is not the Question : But there can be no doubt, that in Queen Elizabeth and her Predecessors Times, the Crown was in possession of that Right of communicating its Pleasure to the Parliament, at what Time and in what Manner it thought proper : And perhaps no Prince was ever more happy in keeping up the Dignity and Prerogative of the Crown, or more careful of the Liberties of the Subject, than she was ; and this was a Point wherein she looked upon her Supremacy as concerned. That this Message was not then thought Unparliamentary, is evident from its being entered in the Journals of that House, without any Mark of its being displeasing.

But the Question is as to the Reasonableness of it ; and the *Examiner* asks what are his Lordship's Sentiments of it ? What Opinion does he desire his Readers should entertain of it ? I may venture without his Lordship's Authority, considering him only as a Bishop of the Church of England, to answer in the Words of his present Metropolitan ; “ *A little more Authority than it now has, would, I am sure, be better for the Church, and I think for the State* ”

" State too. 'However it is to be hoped that in
 " *Matters of Religion*, wherein the *Clergy* by
 " their *Order* and *Function*, tho' not by any
 " *Parliamentary Right*, ought to be advised
 " with ; as in the *Articles of Religion*, the *Dis-*
 " *cipline of the Church*, and the *Publick Litur-*
 " *gies* of it ; they shall either be left entirely
 " to do what properly belongs to them, or at
 " least that no *Law* shall pass in *Parliament*
 " without their *Advice* first taken therein. This
 " Regard we must thankfully own has *bitherto*
 " been paid to our *Bishops* and *Clergy* (in their
 " *Spiritual*, not *Parliamentary Capacity*,) and
 " we ought to promise ourselves, from the
 " *Wisdom* and *Piety* of our *Princes* and *Par-*
 " *liaments*, that this *Liberty* our *Church* shall
 " still continue to enjoy." Yet this *Liberty* is
 by the *Censurer* stiled a dangerous *Scheme of*
Church Power.

I promise my self my Reader's Excuse for giving him so many Extracts out of this learned Writer, who was concerned in Controversy with one of a much more aspiring Temper, and less favourable to those who differed from him ; as the *Examiner's* Intention seemed to be, to point out the Bishop of *London* as the Author of a *New Scheme* for promoting of Church Power : Whereas it will hence appear, that the Ground of the Accusation against him is, for maintaining those Principles, which the greatest and *most moderate* Prelates of the Church of *England* have without Contradiction advanced, and without which the Church Establishment cannot be long supported : And that the *Pa-*
rallel drawn between these two great Men was not so short as some might be apt to imagine.

Exam.
p. 10, 18.

The long Passage then which the *Examiner* has quoted out of the Preface to the *Codex, &c.* does not at all impeach the Power of the Legislature to make what Laws they please, and to make use of what Assistance they judge proper ; but in a fair Construction amounts to no more than this, 1. That, ordinarily speaking, Clergymen may be presumed to be the best Judges of the Regulations and Improvements which are wanting in Church Matters. 2. That therefore calling in *their* Assistance, when such Laws are in making, is the most likely Way to make *wise* and *good* Laws. 3. That thus, in fact, the Practice since the Reformation has been. 4. That inasmuch as the *Convocation* of the *Bishops* and *Clergy*, duly licensed by the *King*, have a Power of making Canons, which being confirmed by Royal Authority, are properly the *Ecclesiastical Laws* of the Church of *England*, and have always been considered as such ; the most *natural* Way of regulating Abuses, and making Improvements in the Constitution of the Church, is for the Convocation in the first Place to go as far as they can, by their own proper Authority, and when they can go no further, to pray the Aid of the Temporal Legislature. 5. That the mentioning Queen *Elizabeth's* Message to the House of Commons to prevent their proceeding in Church Matters, was of use to show, that in those Days it was thought no absurd Thing to say, that Ecclesiastical Matters were most proper for the Consideration of Ecclesiastical Persons. 6. That nothing is said in the Introduction to the *Codex Juris* that can so much as be pretended to be a *Denial* of the Power of the *Parliament* to interpose in Ecclesiastical Matters, when and in what

Manner

Manner they think fit, to the end our Laws in all Cases, if erroneous, may be corrected ; if defective, supplied ; if neglected, enforced ; and if abused, restrained. Could the saying of any, or all these Things, have raised such a tragical Outcry, if there had not been a premeditated Design to represent every Thing in the most odious Colours, without Regard to Truth, or common Ingenuity ?

I might dismiss this Head, but that as the *Examiner* has endeavoured to subvert the legal Power of the Church in making Laws in Spiritual Matters, so he would enervate those already made, and even take away the Sanction they have obtained from Custom or Usage ; which yet is the Foundation of the Common Law of the Land, as well in the Spiritual as in Temporal Courts.

His Lordship is censured for saying, “ That the Foreign Canon Laws, arising from General Councils and the Decrees of Popes, obtained in England before the Reformation by virtue of their own Authority ; but that they have since subsisted on the Foot of Custom : And by being confirmed by the 25 H. 8., as far as they had been received and practised here, not being repugnant to the Royal Prerogative, or the Laws or Statutes of the Realm, had obtained an additional Strength of Statute Law.” This is wire-drawn into a Contradiction, because he has in another Place admitted, that several Parts of that Law had not been received before the Reformation. As to the former Part, if he had been mistaken, what is the Inference ? Does he give any further Authority to them at present than upon the Foot of Custom confirmed by Act of Parliament, which is certainly an additional

tional Strength? None. How are we then hurt by it, so as to occasion a Reflection? But both the Absurdity and Contradiction arises from the false Light wherein he has placed it; and his disingenuously leaving out that Clause which would have explained the whole: "In

Pref. p. 28.

" all Causes where no Rule was provided by
" our own Domestick Laws, the Body of the
" Canon Law was received by the Church for
" a Rule."

Altho' the Pope had no *lawful Authority* here, yet it is too evident that he exercised one, and particularly by his pretended Power of receiving Appeals, introduced his Laws by his own Authority; and, notwithstanding that this was an usurped Authority, yet it cannot be denied but that it was exercised and submitted to: Nay further, the Papal Decrees, &c. before the Reformation, may properly be said to have been binding by their own Authority, as they were made by an Authority to which the Nation was actually subjected in those Days, and thought themselves obliged in Duty and Conscience, and not only by Sufferance of the Prince and Consent of the People.

If the Pope intermeddled in Temporal Matters, and commanded Things contrary to the Law of the Land, or in any Things wherein our Church had its own Domestick Laws, and in such Matters was resisted; it follows not that in other Matters, which properly belonged to the *Church*, his Decrees, and the Decrees of General Councils, were not received and obeyed by their own Authority.

The Force of *Practice* before the Reformation, and since, have been unduly confounded. It is owned that since the Reformation the Foreign

Canon

Canon Law subsists upon former Practice, because the 25 H. 8. has *made* it to subsist, and not otherwise. And from thence arises the *Usefullness* of our Records, to prove from them that such and such Things were *in practice* before the Reformation, and so came under that Statute. But it follows not from thence that they had no other Subsistence but upon the Foot of Practice, before that Statute made them have no other.

But now let us see the superior Reasoning of the *Examiner*, and the Justness of his Conclusions: He says, " That the *ancient Canons* of " our Church were the Work of Provincial " and Legatine Synods, holden in Derogation ^{p. 141.} " to the Royal Supremacy, and by Authority " derived from the Bishop of *Rome*." He had taken the Pains, thro' many Pages before, to show that our *ancient Canons* had their Original from the Laity, and were made in the Wittenagemot or Parliament, and reformed and confirmed by the Conqueror, with the common Consent of the great Council of the Nation in Parliament assembled. Now it serves his Purpose to assert the contrary, he says, That they were the Work of Provincial or Legatine Synods, holden under the Pope's Authority: Thus, rather than not contradict his Lordship, will he contradict himself. He could not but be sensible, that such an Original as he had given them, and their being continued in practice to the Time of the Statute, was as strong a Foundation as any of the Common Laws of the Land, and did not want a saving Clause to support them; but now the Scene is changed, and he will advance any thing to support his Argument.

Besides,

Besides, what he says about the Metropolitan and Legatine Authority, is absurd. The metropolitan Power is as ancient as the first Settlement of Christian Churches ; and is declared to be *ancient* so early as by the *First Council of Nice*. In Virtue of this Power they convened their Provincial Synods, long before the Usurpations of the Church of *Rome*; and no Archbishop of *Canterbury* was the Pope's Legate till some time after the Conquest ; nor when they had the Legatine Power was it of any Advantage to them, in point of holding Synods, but only this, That whereas, as Metropolitans, they could only hold *Provincial* Synods, which they did both before and after the Reign of *H. I.* by their *Metropolitical* Power ; after they were made Legates, they could hold *National* Synods : But the Provincial Constitutions were all made by the proper *Metropolitical* Authority, and not at all by the *Legatine* Authority derived from the Pope, and therefore could not expire with the Papal Authority.

p. 142. However he asserts, “ That when our Constitution was brought back to its first Principles, that the Convocation ought to be assembled only by the King's Writ, and that no Canons or Constitutions ought to be made, promulgated, or executed” [The Statute says from henceforth; and in time coming] “ without his Assent; all the Synods of some Ages past must have been esteemed unlawful Assemblies, and all their Acts mere Nullities, for want of the Royal Mandate to authorize the one, and the Royal Assent to give Life and Force to the other.” There is not the least Complaint in the Statute, that the Convocation met by Virtue of any Papal Authority ; but on the contrary it

it is asserted, " that it is, always bath been, and
 " ought to be assembled only by the King's
 " Writ ;" but that divers Constitutions, &c.
 which beretofore have been Enacted, be thought
 prejudicial to the King's Prerogative, and repug-
 nant to the Laws and Statutes of this Realm. To
 prevent this, for the future, a new Remedy is
 provided, not only as it always had been, that
 they should be convened by the King's Writ,
 but *in time coming* they shall not attempt, alledge,
 claim, or put in ure any Constitutions, &c. with-
 out the Royal Licence and Assent ; and for
 those which had been made, they shall be re-
 viewed, according to the Provision of that
 Statute.

Tho' the King's Writ had frequently com-
 manded them to deal with nothing that con-
 cerned the King's Laws of the Land, his Crown ^{Coke 4} Inst.
 and Dignity, his Person or his State, or the p. 322.
 State of his Council or Kingdom ; yet I be-
 lieve it will not be pretended, that any special
 Licence to make Canons, or express Assent to,
 or Ratification of them, when made, was ever
 required before the making this Statute. How
 then the requiring a greater Strictness for the
 Time to come than was necessary before, can
 be called *bringing back the Constitution to its first
 Principles*, I shall leave this Dealer in Contra-
 dictions to explain ; or even those " Common
 " Lawyers and many Divines he could name,"
 (he does not say of the Church of England)
 " who are of Opinion, that all the *ancient Ca-*
 " *nons* must have dropp'd at once, by Virtue
 " of the Clause which Enacts, *That the Clergy*
 " *shall not put them in Ure*, if the Proviso
 " whereby they are continued in force until
 " they shall be review'd, had not been in-
 " ferted ;"

" serted ;" hoping that they will make use of better Arguments than he has done, to support their Opinion ; or than Dr. Tindal in the Preface to *The Rights of the Christian Church*, from whence it is taken, has suggested.

Exam.

p. 20, 21,
136.

When so extraordinary a Writer as this *Examiner* is pleased to offer a Conjecture, which he calls his own, it deserves a particular Regard : " He fixes the compleating the Separation of the Ecclesiastical from the Civil Courts to King Stephen's Reign ; from whence also are to be dated the many Abuses of Ecclesiastical Power attempted to be reformed by the Statute of Clarendon. -- An exclusive Jurisdiction, conducted and supported by a Body of Laws, compiled about this time, on purpose to countenance the Pretensions of the Church on the Secular Powers. In this Season of publick Distraction, (says he) the Clergy introduced the Study and Practice of the Canon Law into England." The Council of Clarendon was held under Hen. 2. on the

Dr. Wil-
kins, H. 2.
p. 321.

22 Feb. (8 Kal. Feb.) 1164, about ten Years after the Death of K. Stephen, and about 14 after Gratian had finished the *Decretum* : Those Laws are called *Avitæ Regni consuetudines*, viz. Henrici Avi sui, & aliorum antecessorum suorum. It is thereby ordained, Art. 7, " Ut quod pertinet ad Regis Curiam, ibi terminetur ; & de eo quod spectat ad Curiam Ecclesiasticam, ad eandem mittatur, ut ibidem terminetur." So that his Conjecture as to the compleat Separation of the Ecclesiastical Courts, is contradicted by his own Authority.

As to the Introduction of the Canon Law, if he means only that the *Decretum Gratiani* was not introduced before the Reign of King Stephen,

Stephen, it is, I confess, a very probable and a shrewd Conjecture, for it could not well be introduced before it was compiled, which he fixes to the Year 1150, 15 Stepb. Reg. If he means the ancient Canons of our Church, by the Canon Law, he has in another Place, when it served his Purpose, declared, that they were the Work of Provincial and Legatine Synods. p. 141.

The *Decretum* was extracted not only from Papal Decrees, but likewise from the Rules of the Apostles, from General Councils, the Writings of the Fathers, and amongst them St. Austin, our first English Bishop. Were these first introduced in K. Stephen's Time? Let him consult the Canons of *Ælfric*, to which in another Place he refers, he will there find "That there ^{p. 160.} *Lambard.*" were four Synods for the Defence of the true Arch. p. "Faith against those Hereticks who belched ^{134. can.} 33." "out their Blasphemies against the Holy Trinity, and the Human Nature of our Saviour; the First whereof was at *Nice*," (which we are told, *Can. 3.* consisted of 318 Bishops from all Nations, wherein was settled the Liturgy of the Church, and the Creed which we now use, and some other Things appertaining to the Worship and Service of God) "another after that, at *Constantinople*, consisting of 150 Bishops; the Third at *Ephesus*, of 200 Bishops; the Fourth at *Chalcedon*, where many Hundreds of Bishops were present; and they all with an unanimous Consent confirmed all those Decrees which were made in the *Nicene Council*. These four Synods (says the Canon) are to be observed by the Church of Christ, *ut Quatuor Christi Codices.*" The Canons of these Councils are contained in *Gratian's Decretum*,

cretum, and cannot be said to have been then first introduced. What then he means by the Canon Law then introduced, wants Explanation; for he might with equal Reason have asserted, that the *Roman Civil Law* was introduced in the Time of *Justinian*, which had from Time to Time been made from the Infancy of *Rome*, because it was then *Digested*.

p. 135,
136.

With as little Foundation does he suppose that our Spiritual Legislature had likewise its Beginning in the same Reign: That the Clergy, by the Authority and Example of Pope *Innocent the II.* excluded the Laity from their Assemblies: This could not be owing to the Introduction of *Gratian's Decretum*, since he himself owns that *Innocent II.* did not begin his Pontificate till 1150, when that *Decretum* was finished, or according to some a Year before. As the Dr. *Ridley* shops deriving any *Power from the Word of God*,
p. 98. which is the Doctrine and Principle of the *Church of England*, is by him assigned as his Lordship's Fundamental Mistake; so I may venture to assert, that the Position laid down Exam. *p. 120, &c.* by him which is the *Presbyterian* Doctrine and Principle, *That the Ecclesiastical Legislature of the Primitive Church consisted of the Laity as well as of the Clergy; and that they were considered as Members of the Councils or Synods, having a Place and Vote in all Deliberations which concerned the Interest and Government of the Church, as Members of a voluntary Society*: This is, I say, the Fundamental Mistake upon which his Opposition is grounded; and it had been much more ingenuous in him to have set out upon that Footing only, than to have attacked the Church under a Pretence of supporting the State.

The

The Church is not a *voluntary* Society, nor Councils *voluntary* Assemblies; but a Society with which all Christians are *obliged* to join; and Assemblies, which the Governors and ^{Potter, V.} ~~Stors~~ of the Church are *obliged* to attend. ^{1. p. 330.}

If he is desirous to consult with some of the Gentlemen of synodical Learning, I have referred him to those great Men of our own Church, who have clearly proved that the Laity never had Vote or Place in any Council in the Primitive Church; and their Presence in Councils is by them accounted for. The Legislative Power was in the Council, whose Acts all the Proceedings were, and are represented so to be from Beginning to End. ---- The Emperors *only* confirm'd what the Synod had done, to give them a *Civil* as well as an *Ecclesiastical* Sanction; and by that means to give them a greater Influence and Authority.

Were all the Laity Parties to Councils and Synods? That is absurd. Were they there as Representatives of the Body of the Laity? Neither is that pretended. Did they appear there as Lay Elders? It cannot be said they did. Did they Debate and Vote as Members? No.

What the ancient Councils in *Britain* were, is but of little Significance to the present Question; which is not what Synods and Councils anciently were here, but what they are according to our present Constitution. All this is just such an Amusement as the giving a long Detail of the ancient State of the Lords and Commons would be, when the Point in Question was the present Constitution of Parliament.

The Bishops were Members of the Witenagemot or great Council of the Land, and

there some *Ecclesiastical Matters* were transacted, as well as *Civil*; and so it is at this Day. But the Question is, whether at the same Time Bishops did not hold their *Diocesan Synods* of the Clergy, and Archbishops their *Provincial Synods*, and both make Ecclesiastical Orders and Decrees, which were ratified by no Authority but that of the Synods, and being so ratified were practised and obeyed as proper Ecclesiastical Laws.

If the Question were, whether or no the great Council of the Land has a *Right* at this Time to intermeddle in Ecclesiastical Matters, which is in no wise denied, what he says would be very proper; because it would tend to show that they had it from the Beginning: But the Question is, whether by the Constitution of this Kingdom, there is not an *Ecclesiastical* as well as a *Civil Legislature*; and to support the Negative it was incumbent on him to have shown, That there were no *Provincial Councils*, nor *Diocesan Synods* held in those Days.

It cannot be inferred from the Remains which we have of the *Saxon Laws*, that because those which relate to Ecclesiastical Matters are blended with the Civil Constitutions, they had therefore no other Legislature. It is admitted, that during those Times there were some Assemblies purely *Clerical*; and as the Bishops Care was not confined to the Clergy, but extended to the whole Flock, the Censures of the Church were ordained, and Penances enjoined, by the Spiritual Authority, tho' they were assisted likewise by the Temporal Power, as I have already observed.

The Laity were indeed generally present, not as part of the Synod, but for Information and

In-

Instruction, or as at our present Visitations, which are the Remains of them, the Churchwardens attend, to give Information and receive Instructions and Directions. And sometimes for the greater Solemnity, and out of a Religious Zeal, the Princes attended by their Nobles were present. The Instances he gives will not support his Assertion, or *Rapin's Opinion*, "That the Clergy did not treat of Ecclesiastical Affairs as a separate Body, until under Exam. p. 133. the latter Kings of the *Norman Race*." But upon Enquiry we shall find that many of those Assemblies were properly Ecclesiastical.

He tells us, "That two Councils were held in Britain for stopping the Progress of the Pelagian Heresy, the one in 426, the other in 429. It is certain the Laity were present at both; but whether as Members, or mere Spectators, at the First, does not plainly appear. The Second is expressly called *Magna Synodus Clericorum & Laicorum in uno Concilio*, which leaves no room to doubt that the Laity assembled with the Clergy as Members of the Council, and at the same Time renders it extremely probable, that at the other, held but three Years before, they did so too."

As to the First, (which should be 446) we learn out of *Matthew Westminister*, that the Britains had sent to France for Divines to refute the Pelagians, who with their Doctrines fidem Britonum quasi faida peste maculaverant. When Germanus and Lupus, two of the Bishops, were come from thence, they met the Pelagians in a Synod at Verulam, and there disputed with them; *Inmensa multitudo virorum etiam cum Conjugibus & Liberis illuc excitata convenerat*.

Whether it be extremely probable that these were all Members of the Synod, or only Hearers and Spectators, I shall leave to the Judgment of the Reader.

In the Year 449, as it should be, the same Author tells us, that Bishop *Germanus* came over out of *France* the second Time, with a Religious Man, *Severus*, and preached against the *Pelagians*, and established the Faith of the *Britains* against that Heresy for ever. At the same Time that this pious good Bishop *Germanus* was in *England*, (as *Nennius* the Historian says) he hearing of King *Worthigern's* incestuous Marriage with his Daughter, was encouraged by the *British* Clergy to go and reprove the King for it. Accordingly he summoned a great Synod of Clergy and Laity together, *in uno Concilio*, and there by a gentle Reproof made the King very angry, so that he, convinced in his Conscience, sought to flee from the Face of that holy Man *Germanus*, who *cursed* and *condemned* him; to which the *British* Council gave their Consent: *Maledictus & Damnatus à Beato Germano & omni Concilio Britonum*. If the Laity had not been present, I might, perhaps, have incurred as severe a Censure from the *Examiner*, as his Lordship has met with for reciting the Constitution of Archbishop *Boniface*, for mentioning this Proceeding.

p. 127,
128.

At the Council of *Glovesbo*, Anno 747, in the Reign of *Ethelbald* King of *Mercia*, the King with his Nobility and Dukes were present; but by the *Acta Sydonalia* it appears, that all was done by Archbishop *Cuthbert*: *Et Praesules cum pluribus Sacerdotibus Domini & minoribus quoque Ecclesiasticis ratâ sanctione condixerunt*. They decreed and ordered thirty Chapters or Canons,

Canons, which were every where to be observed in their Jurisdictions ; the last of which is, *De modo cobibendi similitates inter Ecclesiasticos & Laicos, & de exorando pro Rege.* And the Act of Exemption of Churches and Monasteries, which he quotes out of *Spelman*, was not granted in this Council of *Clovesho*, but two Years after, and in a Place called *Jodmundeslaecb*.

In the Year 785, (as appears by the *Saxon p. 129*; *Chronicon* published by his Lordship) two Councils were held by two of Pope *Adrian's* Legates ; one in *Northumberland* before King *Ælfwold* ; and his *Principes regionis tam Ecclesiastici quam Seculares* were present : The other at *Calchutb* in the Kingdom of *Mercia*, where King *Offa cum Senatoribus terræ unâ cum Archiepiscopo & ceteris Episcopis Regionum convenerat*. In both which, the same Decrees, twenty in Number, were proposed and enjoined by the Legates : And because those Decrees concerned not only the Clergy, but even the King and the Civil Magistrates, both the Kings and the Archbishops, and the Assembly of Bishops and Nobility, at the Instance of the Legates, subscribed them. And in that of *Calchutb* the Power was wholly in the Pope's Legate. That any other Business was done there besides the Subscribing the Canons is not so very sure, because the Erecting the Bishoprick of *Litchfield* into an Archbishoprick had been attempted before, as appears by the Life of *Offa* in *St. Alban's MS.* And as to King *Offa's* taking his Son into Partnership *in hoc Concilio*, nothing of it is mentioned in the History of that Council. A Legate of the Pope being present there is sufficient to show it was no *Witenagemot* ; and the *Examiner* is very disingenuous, when

Sp. Tom. Spelman, from whom he quotes it, in the very
1. p. 292. Page before calls it *Concilium Calcutbense Lega-*
V. Wake's tinum.

State of As to the other Synod held at *Calcbuth* in
the Ch. the Year 816, which we have out of the Cotton
Ecc. p. 145. MS. I may say as his present Grace of Canter-

Vespasian *bury* did to Dr. *Atterbury* upon the same Quo-
A. 14. tation, “ That it is like most of the others,
fol. 147. “ unfairly represented, and nothing to the Pur-

Wake, “ pose: That the Meeting was a proper Pro-
p. 146. “ vincial Synod; *Wulfred* the Archbishop pre-
“ sided, the other *Bishops* of his *Province* were
“ his *Assessors*. ” *Cenulf*, King of the *Mercians*,
is said to be present *cum suis Principibus, Ductibus*
& *Optimatibus*; but it is expressly said that *Wulfred*
presided, *assentibus sibi Episcopis*, which were
twelve in Number: And when the MS. comes
to treat about the Business, it is thus said, *Tum*
undique sacri Ordinis Praesides, cum Abbatibus,
Presbyteris, Diaconibus pariter tractantes de ne-
cessariis & Utilitatibus Ecclesiarum; *primo loco*
Exposuimus --- Confirmavimus --- Consideravimus,
&c. The King and his Nobles appear to have
been only *Spectators* there; and it does not ap-
pear by the MS. that any Royal Sanction was
given to these Synodical Decrees. This one
Instance then, had it been fairly recited, would
have overturned his whole Hypothesis.

The Council of *Clovesho* 822, was held to
recover Archbishop *Wulfred's* Lands taken from
the Church of Canterbury by King *Ceonwulf*:
Wulfred cited *Cenedrylham* the Abbess, Daugh-
ter to that King, before the Council, and there
obtained, by the Favour of King *Beornulf*, a
Promise from her of the Restitution of the
Lands. And this Reconciliation was sign'd (as
the very original Deed in the *Cotton Library* has
it)

it) by the King, the Archbishop, and thirty-four Clergymen, and by twenty-seven Dukes and other Laymen; all, Yea Witnesses of the Abbes's Promise, and the Archbishop's Acceptance.

Before I come to the Council of *Winton* 947, he will excuse me, if I remind him of one or two which he has omitted, not, I presume, for want of Time or Knowledge, but of Inclination, as not serving his Purpose. One is the Synod held by *Odo*, Archbishop of *Canterbury*, 943, the very Year before those Laws of King *Edmund* were made, inserted in Mr. *Lambard's Lamb.* Collection, at the Council at *London*, at which p. 57. *Odo* was present, and consists of Laws Ecclesiastical and Civil. The First, *Anno 943*, are styled, *Constitutiones Odonis Archiepiscopi, tempore Labbei Regis Edundi late, hoc est Annum circiter Domini 943, in quibus cavetur de officio Regis, Magistratum, & Cleri, & de Juribus Ecclesiae ritè conferendis.* By the Title of them it might be expected, that they should require a Confirmation by the Temporal Authority. His *Synodal Epistle* to his Suffragans is very remarkable, according to *William Malmesbury*. --- *Propter Antiquam Authoritatem prædecessorum meorum -- quorum studiis Regula Christianitatis primum ab hac Archiepiscopali sede cunctis finibus Anglorum innotuit -- Quatenus Rex Augustissimus, Egregio vocabulo Edmundus, cum omni populo suo imitari gaudeat, quod in nobis & ex nobis audiat, omnesque gentes quæ undique Regali Imperio ejus subjectæ sunt, Titulos liquidæ nostræ Conservationis ovanter sequi ament & delecent.* These Constitutions appear to be purely Ecclesiastical, and yet do not relate to the Clergy only, but likewise to the Laity.

Baronii
Annal.
Tom. 10.
p. 802,
&c.

Labbei
& Cossartii
Concil.
p. 702.

There was a general Council held by *Dunstan*, Archbishop of *Canterbury*, by the Direction of Pope *John*, in the Year 970, for the Expulsion of the married Priests. It is called a general Council, *Quod omnes Angliae Episcopi in idem convenissent*. It is said, *Habebat autem Edgarum Regem in bac re fidem adjutorem, & egregium Defensorem*. The Decrees are in the Name of the Archbishop: *Dunstanus Archiepiscopus statuit & Decreto firmavit, ut Canonicci, &c. castè viverent aut Ecclesias dimitterent*. The Business hereof was purely Ecclesiastical; and an *Earl*, who had great Power and Interest with King *Edgar*, having been excommunicated by the Archbishop for an incestuous Marriage, did publick Penance, in presence of the Archbishop, before the general Council, notwithstanding great Intercessions had been made in his behalf, both by the Pope and the King. Thus we find in those Days, that *Incest* had a Spiritual Punishment, notwithstanding the *Drollery* of the *Examiner*.

Ibm.
p. 817.

vid. Baro-
nium Ibm.
Latbei,
&c. Con-
cil. Tom.
9. p. 721.

The Council of *Winton*, 975, was called *Ex præcepto Regis & Archiepiscopi*, upon the same Account; King *Edgar* and Archbishop *Dunstan* presided, but the Controversy was not decided, neither then nor in the Two next Councils of *Calne* and *Almsbury*, held two Years after: Altho' the Authors in these dark Times differ in the Account, others saying that this Council was called by *Dunstan* the Archbishop, in *Intersticio Edgari & Edwardi Martyris Regum*.

If the Council at *Eanhamb*, 1009, were a general Council of the Kingdom, and Constitutions both *Civil* and *Ecclesiastical* were made therein, as it may be admitted was frequently done; it will not follow, that the Clergy had

not

not their proper Synods, and made Laws therein : Nor can I agree with his Conjecture, that the Presence of the whole Nobility is alone a sufficient Argument to prove that it was a Witenagemot or Parliament, they not being the only constituent Part thereof : And we may be well assured that his Lordship's Ecclesiastical Legislature had in those Days a Place in our Constitution, was more regarded, and of greater Power, than at any Time after the Conquest.

Between that time and the Reign of King *Stephen*, many other Councils of the Clergy were held, at *London*, *Westminster*, *Northampton*, &c. Some by the Pope's Legates, others by the Archbishops by virtue of their Metropolitical Authority. In the Council at *London*, 1102, *Anselm*, the Archbishop of *Canterbury*, presided, assisted by the Archbishop of *York* and twelve other Bishops, and several Decrees were drawn up. To this Council *Anselm* (as he himself writes) invited with the King's Leave some of the chief Men of the Kingdom, *Quatenus quicquid ejusdein Concilii Authoritate decerneretur, utriusque Ordinis concordi curâ & sollicitudine ratum servaretur.* And in the Council of *London* 1107, about the Investiture of Churches, altho' there were *Proceres Regni* present (as *Eadmerus*, an Eye-witness, and constant Companion of *Anselm*, writes) yet the Affair was transacted between the King and Archbishop and Bishops, none of the Laity having any thing to do therein.

Numbers of other Instances might be given from the Writers of those Times ; but these are sufficient to show, that altho' Facts, as the *Examiner* says, *are stubborn Things*, yet he can bend them, to make them serve any Purpose.

Had

Had he therefore any Regard to Truth, he must alter his Æra of the Commencement of the Spiritual Legislature; and I am persuaded he can find no time to fix it, but at the planting of Christianity in this *Island*. But were it true what he contends for, that the Power of the Spiritual Legislature, and the separate and distinct Rights and Jurisdiction of the Clergy, in Matters Spiritual, had not been settled till King Stephen's Reign, would it not still be part of our ancient and present Constitution? Confirmed by *Magna Charta*, the Foundation of the English Rights and Liberties, and through various Revolutions continued down to this Day, and for ever secured to us under the present Royal Line; designed by Providence, not only to be the Preservers of our Civil Liberty, and our Defence against Popery, but for the Support and Protection of the Church of *England*, saved from the Invaders of its Rights by the Immortal *Nassau*.

As the Bishops and Clergy assembled in Convocation according to the Laws, Usage, and Statutes of the Realm, have an undoubted Legislative Authority; and the Laws duly made by them, being ratified by his Majesty, are the King's Ecclesiastical Laws: The next Enquiry will be, What is the Force and Extent of those Laws? For the Obligation is the Essence of the Law, and Law necessarily includes some Bond or Obligation; and it can be no Law to those who are not bound thereby. In what Matters and whom then do they bind? It is asserted, that Canons so made do not bind the Laity in Ecclesiastical Matters. If we were to go to the Original, did the Rules of the Apostles

titles bind only the Clergy ? In the Primitive Church, did the Canons made in their Assemblies, (the Nature of which I have already shown) before the Empire became Christian, or any Temporal Authority was had to establish them, bind the Clergy only ? It is indeed argued that the Laity was part of those Assemblies ; but could they, who had at that Time no Authority in themselves, give any Authority ? Had the Clergy, in this Kingdom, in their Synods, from the earliest Ages to the Time of the Reformation, no Power over the Laity in Spiritual Matters ? Or, before the 25 H. 8, what Act of Parliament was there to confirm their Provincial Constitutions ? And were not the Laity bound thereby ? And what Alteration has that Act made in their Legislative Power when assembled and acting under his Majesty according to that Statute ? None at all. Their Legislative Power then, under the Restrictions of that Statute, continues still the same ; his Majesty's Ratification gives their Decrees a Legal Authority, and they are binding on all who are subject to him, in Ecclesiastical Matters, without Distinction, whether Clergy or Laymen, the Power being general as to the Persons, tho' restrained as to Subject Matter of those Laws, and confined to Things Spiritual, or what according to the Laws of the Land have been reckoned to be of a Spiritual Nature ; and the Breach of these Laws has always been punished by the Censures of the Church, also without Distinction of Persons.

But the *Examiner* says, That it is a Maxim in all free Governments, and especially in ours, *That the Subject is bound by no Laws, to which he is not a Party in Person or by Representation.* I believe

believe he will hardly persuade the Gentlemen of *Great-Britain*, especially those of the House of Commons, so far to part with their Temporal Rights, as to discharge all *those* Subjects of *Great-Britain* from their Obedience to the Laws made by them in Parliament as part of the Legislature, who have no Vote in the Choice of the Members, who are at least three Parts in four, and are therefore not otherwise represented than by the Implication of Law. This was the Case till late of both the Universities, who had no Representatives of their own chusing, yet were under the general Care and Protection of the Legislature: For where the Constitution of the Realm has vested the Legislative Power in particular Persons, by whomsoever they are chosen, they are by Implication of Law the Representatives of the whole Nation. As then each Minister in *England* has the Care and is the Representative of his particular Parish in Matters Spiritual; the Convocations, who are either in Person, or by Representation, the collective Body of the Clergy of *England*, may make Laws to bind all *English* Subjects in Matters Spiritual, as far as they do not interfere with any of the Temporal Laws of the Land, or the King's Prerogative; and his Majesty, as before mentioned, by consenting to, approving of, and ratifying such Laws, gives them a Legal Sanction and Authority; who according to the Words of the Canon "bath the same Authority in Causes Ecclesiastical, that the Godly Kings had amongst the Jews, and the Christian Emperors of the Primitive Church:" And this is too bright a Jewel to be stripp'd from the Crown.

Can. 2.
1603.

Let

Let me then consider the Authorities he has vouch'd for the contrary Doctrine; and I will begin with the most modern, which is from *Salkeld*. And here I must again complain of the Disingenuity of this Writer, to put upon his Reader the Arguments of the Council as the Determination of the Court, as those who are unacquainted with it must apprehend; and that in a Point of this great Consequence. But what is the Argument? “That in the Primitive Church the Laity were present at all Synods.” It does not say as a constituent Part: If that be meant, it is denied; if only present, it concludes nothing. “When the Empire became Christian, no Canon was made without the Emperor’s Consent.” The contrary is plain from the Imperial Edicts themselves; the *Sacerdotium* and *Imperium* are distinguished; the Canons had their *Ecclesiastical* Sanction from the Synod, and subjected the Believers to the Censures of the Church; the Emperors only confirmed what the Synod had done, to give them a *Civil Authority*, the better to enforce them. “The Emperor’s Consent included that of the People, he having in himself the whole Legislative Power, which our Kings have not.” From hence it follows, that wheresoever the Laws of the Land have fixed a Power, it implies and includes the Consent of the People; and thereby either destroys his Conclusion, which is, “Therefore if the King and Clergy make a Canon, it binds the Clergy in *Re Ecclesiastica*, but it does not bind Laymen: They are not represented in Convocation, their Consent is neither asked nor given:” Or shows that he is begging the Question, viz. That the King by virtue of the

Prero-

Salk. 412.
672.Exam.
p. 149.

Prerogative of his Imperial Crown, cannot enact Laws after they have passed the two Houses of Convocation, to bind in Ecclesiastical Matters, which is the Point in Question. And as he is not pleased to tell us what was the Determination of the Court in this Case of *Matthews and Burditt* reported by *Salkeld*, it can have no Authority.

*Coke, 12
Rep. 72.*

*Exam.
p. 149.*

*Cod. Jur.
Can. Ang.
Præf. p.
30. Noy's
Rep.*

p. 139.

*Moore,
p. 783.*

The next is the Opinion of Lord Coke, "That the Convocation may make Constitutions by which those of the Spirituality shall be bound, *for this*, that they all by Representation or in Person are present, *but not the Temporality;*" who founds it altogether upon two Cases in the *Year Books*, which if they do not support his Assertion, it is altogether without Foundation: And he will permit me likewise to say, "That the Doctrine under Consideration is too important to be rested on the single Opinion of any Man whatever," especially if it should appear to be contrary to the Opinion of the same Person in other Cases; for we may then rather presume that the Sense of his Words is mistaken: And it had been but common Justice, both to his Lordship and the Reader, if the *Examiner* had, to the Authority of Lord Chief Justice *Vaughan*, added, as his Lordship did, that likewise of the Lord *Coke* himself ---- *Coke* Chief Justice said, *That a Convocation hath Power to make Constitutions for Ecclesiastical Things or Persons,* 20 H. 6. 14.

21 Ed. 4. 46. The direct contrary Opinion is founded thus upon the same Authority. And in the Case of *Bird and Smith*, the Lord Chancellor called to his Assistance *Papham*, Chief Justice; *Cook*, Chief Justice of the Common-Pleas; and *Flemming*, Chief Baron; and they all

all agreed ---- 3. "That the Canons of the
 " Church made by the Convocation and the
 " King without the Parliament were binding
 " *in all Matters Ecclesiastical*, as well as an
 " Act of Parliament: For they say, that by
 " Common Law every Bishop in his Diocese,
 " Archbishop in his Province, and the Convo-
 " cation in the Nation, may make Canons to
 " bind within their Limits: For that the Con-
 " vocation of the Clergy was once a Member
 " of the Parliament of this Realm, and after
 " severed for ease, and carry their *peculiar Fun-*
ction with them into the House of Convoca-
 " tion; ---- whereby when the Convocation
 " makes Canons of Things appertaining to
 " them, and the King confirms them, they
 " will bind the *whole Realm.*" Can this Opin-
 " ion of Lord Chief Justice Vaughan be called a
 single Opinion?

The Cases then upon which both these Opin-
 " ions of Lord Coke were founded, and to which
 all, who have followed, or rather mistaken,
 the First of them refer, do, I admit, prove
 that the Acts of Convocation do not bind in
Temporal Matters; but it was not therein deter-
 mined that the Laity are not thereby bound in
Matters Spiritual: And the Authority from
 Brook is only an Abridgment of those Cases.

The First of these Cases was, (which will
 likewise explain the Second) relating to the Ab-
 bot of *Waltham*, and was argued in the Exche-
 quer Chamber. The King by his Letters Pa-
 tents had exempted the Abbot of *Waltham* and
 his Successors, from being Collectors of the
 Subsidies of the Clergy. The Convocation (of
 which the Abbot was a Member) granted a
 Subsidy, and in the Grant had made this Pro-
 vision,

vision, That after the Bishop had returned a Collector to the Exchequer, he should not be refused, notwithstanding any Letters Patents of Exemption to the contrary. The Abbot of Waltham being returned by the Bishop of Winchester, as Collector, he being Archdeacon of Surrey, in the Court of Exchequer pleads his Patents of Exemption ; and hereupon the several Arguments and Opinions of the Judges arise.

Cates. ---- He is Estopped from any Advantage of the Charter, for he is one of them who granted the Disme, is Party and Privy to the Grant and to the Proviso ; for among the Clergy the Convocation is of as great Force as the Parliament among Persons Temporal, [les Temporelx] and by every Act of Parliament, every one to whom the Act extends, shall be bound, for that every Man is Privy and Party to the Parliament.

Pigot ---- To the same Effect --- He is Party and Privy to the Act ---- They may bind themselves by an Act of their Convocation, as well as we may bind our selves by an Act in Parliament. ---

Vaivasour ---- He will not be Estopped, for the Convocation have no Power to bind any Thing Temporal, but that which is Spiritual [lier ascul Temporalte, mes ceo que est Spirituel] s. to ordain Fasting Days and Holidays, and they are only Spiritual Judges --- The King's Letters Patents are mere Temporal Matter.

Genny Just. ---- As to the Discharge the King may very well grant it, for notwithstanding the Convocation is Spiritual, and all their Acts are Spiritual, yet when their Act is certified into the Exchequer, the Disme granted is merely Temporal. ----

Hussey ---

" *Hussey* ---- The Matter of the Record, as it is
 " pleaded, is not effectual. ---- And so was the
 " Opinion of all the Justices, and it was af-
 " terwards so adjudged in the Exchequer, and
 " the Abbot was charged with the Collection
 " at that Time ; but it was said that at another
 " Time he may have the Advantage of the
 " Letters Patents."

The other Case was where the Prior of *Leeds*
 claimed the same Exemptions granted to him
 by Letters Patents, and upon a Doubt of the
 Barons it was adjourned into the Exchequer
 Chamber. It is there likewise said, " That the
 " King's Letters Patents are Temporal ----
 " *Newton* --- The Ordinary by his Convocation
 " has Power to make Holidays and Fasting-days,
 " but not to allow or disallow the Patents of the
 " King : But they have Power to make *Provincial*
 " *Constitutions*, whereby those of Holy Church
 " shall be bound, but they can't do any thing
 " which shall bind *La Temporalité*.

^{20 H. 6.}
_{13.}

" *Fortescue* ---- The King may by the same
 " Reason he has discharged the Prior, dis-
 " charge every other Parson of the Bishop's
 " Diocese, and then the Bishops must collect
 " it, which is against Law to take away the
 " Subjection which the Bishop has in his Sub-
 " jects ; and that Patent which the Prior has
 " shown, tends to that Purpose." ---- The
 Judgment is not set down, as in the other.

The Words of *Newton*, *La Temporalité*, can-
 not be interpreted to relate to Persons [the
 Laity] but to *Things*; for the Person here was
 Spiritual, the Patents Temporal. Consistent
 with the Manner of expressing it in the former
 Case, the Persons are called *Les Temporels*, the
 Thing *Aucun Temporalité*, in Opposition ^{to} *Ceo*

Ce que est Spirituel : And it is in other Cases applicable as well to Things as to Persons. Thus the Sheriffs Return in Relation to Clerks was, *Ils n'ont rien en le Temporalité, mes tout en le Spiritualité* : And during the Vacancy of a See, the King has the Temporalities, the Archbishop is Guardian of the Spiritualties. What a strange Conclusion is it then from these Cases, that because the Clergy in Convocation cannot bind in *Temporal Matters*, therefore they cannot bind the Laity in Matters Spiritual? But I think the contrary appears from these very Cases. They may make Holidays and Fasting Days. Were the Clergy only to observe them, or did they bind the Laity? If they did, as at that Time it cannot be doubted, the Laity were then bound in Spiritual Matters by the Act of the Convocation. The Reverence, Attention, and proper Behaviour of the Congregation, in the time of Divine Service, is regulated by our later Canons ; and those who do otherwise, may be presented and prosecuted for it ; and as yet there have been no Prohibitions upon that Head, and we have Reason to hope there will not ; yet this Authority which binds the Laity does not arise from any Act of Parliament.

It may have frequently been determined, that any Temporal Rights which the Laity have by the Laws of the Land, cannot be altered by the Canons, altho' it should relate to Spiritual Matters ; and Churchwardens and Parish Clerks are allowed, where it is founded upon Custom, to be chosen by the Parishioners, exclusive of the Minister, notwithstanding the Direction of the Canons. But, as I am informed, there never yet has been any one Determination in our Courts of Justice, that in Matters

Matters Spiritual the Laity are not bound by the Canons: And if there had, the *Examiner* is not guilty of Concealments of that Kind, and would, no doubt, have mentioned it: However, in a Point of this Nature, had his Lordship mistaken the *Superior* Reasoning of the Common Lawyers, which I hope he cannot be thought to have done; yet since it is what our Canons have expressly taught, he would at least not have deserved a Censure.

Can. 1603

140.

I shall proceed to the next general Objection against the Sufficiency of the Body Spiritual, in their *Prudential Capacity*. It is so obvious to every one's Understanding, so suitable to common Sense and Reason, that it will require but little Argument to prove, that as they are most conversant with Spiritual Persons, and in Spiritual Things, they must certainly best know, and are best able to give their Advice in relation thereto; and as his Majesty has an undoubted Right to consult and advise with whom he pleases, so his own Wisdom will direct in the Choice of his Counsellors to those whom he thinks most capable; and he has a Right to the Obedience and Advice of his Subjects when he is pleased to require it. The Prelacy was therefore founded and endowed with Honours and Possessions by the Kings and Nobles of this Realm, that he might have Persons of Distinction to assist him in *all* Spiritual Matters, who might likewise, by their Station, be the best Judges of *all* Spiritual Persons.

Agreeable to this Design of their Institution has been the uniform Practice of our Princes and Parliaments ever since the Reformation.

Anno 1533, 25 H. 8. The Review of our ancient Canons and Constitutions is expressly said in the Act of Parliament passed for that Purpose (c. 19) to have been first moved by the Clergy in Convocation. --- The said Clergy (so the Words of the Act are) bath most humbly besought the King's Highness, that the said Constitutions and Canons may be committed to the Examination and Judgment, &c. --- And the Design having taken no Effect in the Reign of H. 8, and been again defeated by the sudden Death of

Strype Ref. Ed. 6, we find it proposed in Convocation *Anno p. 297.* 1562, to move her Majesty, *That certain learned 13 Eliz.* Men, Bishops and others, might be appointed to set down Ecclesiastical Orders and Rules in all Ecclesiastical Matters for the good Government of the Church of England, as should by them be thought most meet: And the same in this present Session of Parliament, whatsoever they shall order or set down in one Year next, to be effectual, and for Law confirmed by Act of Parliament, at or in this Session.

Anno 1536. The Motion for translating the Bible into English, came from the Convocation, as appears from the Petition of the Bishops, Abbots, and Priors, to the King; *Ut dignaretur decernere, quod sacra Scriptura in linguam vulgarem Anglicanam, per quosdam Prælatos & doctos viros, per dictum Illustrissimum Regem nominandos, transferatur.*

Anno 1538. The Book call'd *The Institution of a Christian Man*, published by King H. 8, in furtherance of the Reformation, was first sign'd by nineteen Bishops, eight Archdeacons, and seventeen Doctors of Divinity and Law, the same in Substance that was afterwards published under the Title of, *The necessary Doctrine and Erudition*

Erudition of a Christian Man, which the King says in the Preface, that he set forth with the *Advice of his Clergy*, and adds, that it had been seen and liked by both Houses of Parliament.

Anno 1539. In the Act entitled, *An Act for abolishing Diversity of Opinions in certain Articles concerning Christian Religion*, it is recited in the Preamble, that for a full Consideration of that Matter, the King had summoned his Parliament, and also a Synod and Convocation of all the Archbishops, Bishops, and other learned Men of the Clergy of this Realm to be in like manner assembled --- And that he had commanded, that the said Articles should deliberately and advisedly by his said Archbishops, Bishops, and other learned Men of his Clergy be debated, agreed, and reasoned, and their Opinions thereon to be understood, declared and known ---- And the Act is finally passed, as well by the Consent of the King's Highness, as by the Assent of the Lords Spiritual and Temporal, and other learned Men of his Clergy in their Convocations, and by the Consent of the Commons in this present Parliament assembled.

Anno 1540. A Committee of Bishops was appointed to examine the Rites and Ceremonies of the Church.

Anno 1542, 32 H. 8. In an Act, entitled, *An Act concerning true Opinions, and Declaration of Christ's Religion*, it is recited by way of Preamble, that the King had appointed, established and ordained the Archbishops and sundry Bishops of both Provinces of Canterbury and York, and also a great Number of the best learned, honestest and most virtuous Sort of Doctors of Divinity ---- to consider and declare their Judgment concerning the principal Articles of Faith, and the Rites and Ceremonies fit to be observed. And

the Act ratifies all such Articles and Ceremonies as shall be resolved by the said Archbishops and Bishops, &c. or else by the whole Clergy of *England*, and confirm'd by the King's Letters Patents under his great Seal.

Anno 1542, 34, 35 H. 8. c. 1. All Printers are required by that Act, to put the Subscription of every Book, containing Matters of Religion, in this Form, *By the King and his Clergy:* And in 1542, the Homilies were composed in Convocation, and confirmed and recommended by the King, and some Years after ratified by Parliament,

Anno 1544. Prayers for Processions and Litanies were put into *English*, and published, and the Title was, *An Exhortation to Prayer, thought meet by the King's Majesty and his Clergy to be read to the People in every Church before Processions.*

Anno 1548. A Committee of select *Bishops* and *Divines* was appointed to examine and reform the Offices of the Church.

Anno 1548, 2, 3 Ed: 6. c. 1. In the first Act of Uniformity, the Preamble recites, *That to the Intent an uniform, quiet and godly Order should be had, the King had appointed the Archbishop of Canterbury, and certain of the most learned and discreet Bishops, and other learned Men of this Realm, to consider and ponder the Premisses; and thereupon having as well Eye and Respect to the most sincere and pure Christian Religion taught in the Scripture, as to the Usages in the Primitive Church, should draw and make one convenient and meet Order, Rite and Fashion of common and open Prayer and Administration of the Sacraments ---- This being finished was presented*

to the King, and afterwards confirmed by Parliament.

Anno 1549, 3 Ed. 6. c. 12. It is Enacted; That such Form and Manner of making and consecrating of Archbishops, Bishops, Priests, Deacons, and other Ministers of the Church as by six Prelates, and six other Men of this Realm learned in God's Law, by the King's Majesty to be appointed and assigned, or by the most Number of them, shall be devised for that Purpose, and set forth under the great Seal of England before the first Day of April next coming, shall by virtue of this present Act be lawfully exercised and used. ---- This was done, and the Form prepared and settled according to the Directions of this Act was afterwards confirmed by Parliament in the second Act of Uniformity, 5, 6, Ed. 6.

Anno 1552. Articles of Religion were agreed upon in Convocation, and afterwards published by the King.

Anno 1553, A new Catechism was published by the King's Order, and said in his Patent to have been perused and allowed by the Bishops and other learned Men.

Anno 1558, 1 Eliz. c. 2. The Queen is impowered to make Alterations in the Book of Common Prayer (then established) as to the Ornaments of the Church and the Ministers thereof, and also as to the Rites and Ceremonies, with the Advice of her Commissioners, or of the Metropolitan of this Realm.

Anno 1562, 13 Eliz. The Thirty-Nine Articles were first agreed upon by the Archbishops, Bishops, and Clergy in Convocation, and then confirmed by Authority of Parliament.

Anno 1603, King James Ist. advises with several of the Bishops and Clergy concerning

Matters of Religion, in the Conference at Hampton-Court, and sets forth in his Proclamation, That the Alterations in the Book of Common Prayer, made pursuant to that Conference, were made by the Consent of the Bishops and other learned Men.

Anno 1661, 13, 14 Car. 2. When the Book of Common Prayer came again under publick Consideration, the Regard that was paid by King and Parliament to the Bishops and Clergy on that Occasion, is largely set forth in the Preamble to the Act of Uniformity, which was then passed in pursuance of what the Convocation had done. " The King's Majesty (according to the Declaration of the twenty-fifth of October 1660) granted his Commission under the great Seal of England, to several Bishops and other Divines, to review the Book of Common Prayer, and to prepare such Alterations and Additions as they thought fit to offer ; and afterward, the Convocation of both the Provinces of Canterbury and York, being by his Majesty called and assembled (and now sitting) his Majesty hath been pleased to authorize and require the Presidents of the said Convocations, and others the Bishops and Clergy of the same, to review the said Book of Common Prayer, and the Book of the Form and Manner of the making and consecrating of Bishops, Priests, and Deacons ; and that after mature Consideration, they should make such Additions and Alterations in the said Books respectively, as to them should seem meet and convenient ; and should exhibit and present the same to his Majesty in Writing, for his further Allowance and Confirmation. Since which

" which Time, upon full and mature Deliberation, they the said Presidents, Bishops, and Clergy of both Provinces, have accordingly reviewed the said Books, and have made some Alterations which they think fit to be inserted to the same; and some additional Prayers to the said Book of Common Prayer, to be used upon proper and emergent Occasions; and have exhibited and presented the same unto his Majesty in Writing, in one Book, entituled, *The Book of Common Prayer, and Administration of the Sacraments* ---- All which his Majesty having duly considered, had fully approved and allowed the same, and recommended to this present Parliament, That the said Books of Common Prayer, and of the Form of Ordination and Consecration of Bishops, Priests and Deacons, with the Alterations and Additions which have been so made and presented to his Majesty by the said *Convocations* be the Books which shall be appointed to be used." ----

Anno 1689, 2. Wm. and M. When the Design was to make further Alterations in the Book of Common Prayer, a Commission was issued to several *Bishops* and other *Divines*, to review the said Book, and to make such Additions and Alterations as they should judge proper, in order to be laid before the Convocation, and after having been approved there, to be laid before the Lords and Commons in Parliament, for their Confirmation.

It appears by the foregoing Specimen, what has been the Sense of the successive Reigns since the Reformation, and the Regard that is due to the *Bishops* and *Clergy*, in Matters which concern

concern the Church and Religion, and the Assistance which may reasonably be expected from them within the Verge of their proper Profession, both by Prince and Parliament. And it is no wonder to see that it has been the Sense of every Age, since it is the plain Dictate of common Sense and Reason.

p. 70.

These Instances may likewise show what Regard is to be had to the Historical Veracity of the *Examiner*, when he asserts, “*That the great Work of the Reformation was chiefly conducted by Lay Councils in Opposition to the Clergy.*” --- “*And that the Act of Uniformity, a Law very conducive to the Ends of Religion, had not the least Countenance from them.*”

It is surely hard upon the great Men in the Church, that whilst all others may be worthy to be consulted with in their several Employments, these only, in his Opinion, should be excluded. But certainly he cannot be in earnest, when he contends, with such an Air of Assurance, that Bishops and Clergymen are not the most proper Assistants to the Prince in the Administration of *all* Affairs relating to the Church and Clergy. Is there any Order of Men in the Kingdom that is better acquainted with Spiritual Persons and Spiritual Things, than the Bishops and Clergy; or any that have the Prosperity of Religion, or the Good of the Church, as by Law established, more at Heart? Why does the Prince, in Matters relating to the Army, advise with his Generals; in Matters relating to the Navy, with his Admirals; in the Revenue, with the Managers of his Treasury? but that these, by the Experience they have acquired, and the Application they give to the Business in their several Stations, are presumed

fumed to be most capable of giving right Advice. And altho' at some Times, and in some Instances, it should happen that the Advice they give is *not* right, this does not affect the *general Rule*; nor does it discourage Princes from continuing to use the Assistance of any of those, who are best qualified by their Stations to give him true Accounts of Persons and Things.

It is true, that in some Cases, the Steps taken in Ecclesiastical Matters may also affect the Civil State; but when that happens, the Prince has his *State Counsellors* at hand to give him timely warning of any Advice which Churchmen give, that may be prejudicial to his other Affairs: And it must be remember'd, that the Thing pleaded for is, only *Advice* and *Assistance*, as proper to be received from Churchmen, in Church Matters; but if these had not been wrought up into the Notion of *prescribing* and *dictating*, they would not have supported the Tragical Outcry he has raised upon this Head.

If in these Matters they are not allowed to be advised with, in what are they? In the Army? No. Theirs is the Doctrine of Peace. In the Navy? No. In the Treasury? 'Tis none of their Province. In the Common Law? There is a general Prohibition, 'tis meer Temporal Matter. Wherein are they to advise, wherein to assist, if not in Spiritual Things, and in Relation to Spiritual Persons? But it is, *all* Affairs, that concern Spiritual Persons or Spiritual Things: What is the Exception, from what Particulars are they to be excluded? The *Examiner* has been pleased to mention two, in Relation to the Convocation, which I have already

ready taken notice of, and the Nomination to the vacant Sees. What are his Lordship's

Pref. Cod. Words ? " The most proper Assistants to the Jur. p. 22.

" Prince in the Administration of all Affairs
" which concern Spiritual Persons and Spiritual
" Things." To say that " The Clergy of our
" Reformed Church have not yet had the Har-
" diness to claim the Disposal of them *in direct*
" *Terms*, but what has been thought too much
" to be avowedly insisted on, is certainly included
" in the general Claim his Lordship makes in behalf
" of the Church," is a manifest Calumny.
Does this interfere with the discretionary Power
of the Crown in disposing of Bishopricks ?
Does his Majesty, in any Matters where he
thinks proper to command the Advice of his
Subjects, lose thereby the Disposal ? If the
Examiner thinks so, in whose behalf does he
make the Claim ? Or would he exclude the
Crown from all Assistance ? He says " It is
" filling up twenty-six Vacancies in the House of
" Lords. A Peerage, with a suitable Revenue
" and great Dependencies." I wish he could
make his Words good, and that all the Bishop-
ricks had a Revenue suitable to their Peerage.
But were it so, is their Number too great in
Proportion, as one of the Three Estates of the
Realm, and would he have them fewer ? We
find the Lay Peerage often increased, but they
continue the same. The utmost Inconvenience
he can suggest is, that they may be more zealous
for the Interest of the Church and Clergy :
Would he have Bishops who are not so ? Or
may we hope in time to have Lay Bishops ?
I need not ask if the *Examiner* would have it
so ; but would any Member of the Church of
England desire it ? For as he can make no Di-
stinction

Exam.
p. 68.

ftinction between Advice and Nomination, may we not thus argue from the lowest to the highest Offices in the Church? We are taught by the Learned in the Common Law, that when a Parish Clerk is chosen by his Parishioners, tho' his Duty relates to the Service of the Church, yet it is become a mere Lay Office; and tho' the Ordinary may censure him, he cannot remove him. If then Advice and Nomination be the same, and the Clergy are to be excluded, may it not likewise be thought that the Office of a Bishop may become a mere Lay Office? The Qualification of Orders can make no Alteration; it would then be looked upon as accidental, for a Parish Clerk, who is in Orders, if chosen by the Parish, (as there are many) makes no Alteration in the Nature of his Office: But as a Right of Nomination is not even covertly attempted, their Advice and Assistance, when his Majesty is pleased to command, can never be thought improper.

Were those Bishops, who have been appointed by the Crown, under a Clerical Administration in Church Affairs, less zealous for the Support of the Revolution, for settling and defending the Protestant Succession, less careful of the Rights and just Prerogatives of the Crown, or less solicitous for the Good of the Church and Kingdom? No. The Objection has indeed been that they are too dependent on the Crown, and therefore the *Examiner*, to remedy this, can find a Way how they may be more dependent on others.

We are told, that by *Lesley's* Advice to his *Pupil*, the Agent of the Pretender had given Assurances, that the Supremacy of the Crown should be vested in a Committee of the *English Clergy*;

Clergy; whereof the Archbishop of Canterbury for the Time being to be always one. Vain Assurances! To think that the Church of England could ever be secure with a Popish Prince on the Throne! She too well experienced in the late King *James* the Second's Time, that they had other Tools to work with, besides Papists; and the Church was to be destroyed under the pretended Concern and Tenderness for the Dissenters. No, the greatest Security of the Church is the Supremacy of the Crown, whereby, as a Body Spiritual, it is united to the King as Head, who is thereby its Protector and Defender. But can that which was idly looked upon by them as offering a Barrier against Popery, a Security against an Enemy, be thought improper under the Direction and Discretion of a Protestant King, and in Subordination to him alone? And did not *Lesley* so far borrow this Scheme from the Practice of the great King *William*, who after the Death of Queen *Mary* put the Disposal of Church Preferments into the Hands of the two Archbishops, and others of the Bishops?

The Third General Objection against the Sufficiency of the *Body Spiritual*, is, in their Judicial Capacity. If we consider the different Method and End of Punishments in the several Judicatures, the Temporal and Spiritual, we may find that the Punishment of Vice and Immorality is the proper Province of the *Body Spiritual*, more effectually to prevent those greater Enormities, which as they disturb the Peace of the Kingdom, and the Welfare of the Common-weal, require the Interposition of the Temporal Arm; and when the Legislature have thought

thought it necessary to give a further Assistance and Punishment, that it should by Interpretation be made exclusive and confined only to the Temporal Courts, cannot so well answer the End, but must prove prejudicial to the Publick.

The Method of the Temporal Judicature is, by the Severity of the Punishment of a few, to deter others from the like Crimes: And it has been thought necessary upon that Account, to extend the sanguinary Laws in this Kingdom, from the Boldness of the Offenders, further than perhaps was ever done in any other Nation. That of the Spiritual is, by a general and salutary Punishment, to prevent, if possible, the first Principles of Vice, to correct the inward Man, and eradicate those Seeds of Immorality, which in Time produce the greatest Enormities: And common Experience tells us, that those poor Wretches, who are made the severest Examples of publick Justice, generally impute their Misfortunes to Sabbath-breaking, Drunkenness, Lewdness, and other such like Immoralities.

Lord Coke, after he has finished his Treatise of Temporal Crimes, says, "That we have found by woful Experience, that it is not frequent and often Punishment that doth prevent like Offences; *Melior est enim Justitia verè præ-veniens, quam severè puniens.* But I leave it to Divines to inform the inward Man *Verbo Informante*, the outward Man will be easier reformed *Virgâ Reformante.*"

*Coke 3
Inst. Epi-
logue.*

How unjust is the Examiner's Censure of his Lordship's Assertion, "That Spiritual Hands are most proper for detecting and punishing Spiritual Crimes, and the Work is most likely to prosper in such Hands." Here likewise

wise to make the Assertion odious, he represents it as a Design to take the Punishment of Vice out of the Hands of the Civil Magistrate, or to make them bear a dishonourable Part in that Work : Whereas the Thing complained of is, That the Temporal Laws, which have been made for the Punishment of Drunkenness, Common Swearing, Profanation of the Lord's Day, &c. have in effect taken the Cognizance of those Crimes out of the Hands of the Ecclesiastical Jurisdiction, and yet the Execution of those Laws is almost universally neglected. This Writer acquaints us with the Pleasure he has received at the Courts of Goal Delivery and Quarter Sessions, in hearing his Majesty's Proclamation read, and the Civil Magistrate required to put the Laws in Execution against *all manner of Vice, Profaneness, and Immorality*. But to remove the Objection, he should have told us the Pleasure he had to see those Laws *vigorously* executed ; and further, how many Instances he has known of Presentments of Lewdness, and corporal Punishments inflicted on either of the Parties, after Security has been given to maintain the Child, and keep the Parish harmless. Nay, are even Murders, Robberies, Adulteries, Perjury, Blasphemy, Profaneness, and all Immorality, less frequent and abated ; or do they not manifestly increase ? It is too apparent they do. To what then can it be imputed, but to the Defect of *preventing Justice* ; from the Corruption of Principles, the Relaxation, or rather Abolishment of Discipline, ridiculing Religion, and eradicating the Fears of hereafter out of the Minds of Men ? If Religion, as the Freethinkers would insinuate, was only the Invention of Politicians to keep

keep the World in Obedience, sure he must be a very weak Politician who would discharge them from that Tie. In this State of Things, under this general Corruption, a good Man may well be allowed to lament, that the Temporal Laws against Vice and Profaneness have little Effect, but to tie up the Hands of the Spiritual Judge, and discourage him from proceeding in such Cases, by the Handles those Laws give for Prohibitions from the Temporal Courts.

The Introduction to the *Codex Juris*, speaking of the general Neglect of executing the Laws, adds, *That the only Way to make Temporal Punishments truly beneficial to Religion, is to provide them as a further Terror and Punishment, to be called in as oft as the Censures of the Church are disobeyed;* at which the *Examiner* appears to be very angry. This must, in common Sense, be understood of Crimes of a Spiritual Nature; and I cannot see the Absurdity or Inconvenience of obliging Civil Magistrates, upon Complaint made to them by the Ecclesiastical Judge, that the Censures of the Church are ineffectual, to inflict Temporal Penalties on such Offenders. Is it so inconsistent with the Superiority he contends for? Are they only to restrain, and not to assist the inferior Power, when it is too weak? *Ut Gladius assistat Gladio.* It is not beneath the Dignity of the King of Great-Britain, at the Request of any Foreign State, in his Court of Admiralty to enforce a Sentence given even in a Foreign Judicature, *sub mutuae vicissitudinis obtentu,* and to give Credit to the Truth and Justice of their Proceedings; and why it should be so absurd at home, for one Jurisdiction to

I assist

assist the other, I cannot imagine, whether it were subordinate or not.

If this Writer had attended to the first Stat. of Appeals, 24 H. 8. he would have found that the *Spirituality* is there put in Opposition to the Judges of the Common Law. It includes *Civilians* and *Canonists*, as they stand distinct from Common Lawyers, and not only Clergymen, as he would suggest ; and can any Thing that is said in the Introduction to the *Codex Juris*, be possibly explained to exclude Civilians and Canonists out of the Court of Delegates ? Surely not. It is admitted that the Ecclesiastical Court has a Jurisdiction in Matters which were originally of a Spiritual Nature, as Causes Matrimonial, Causes Testamentary, and the like, which by the ancient Usage of the Kingdom, or by ancient Statutes of the Realm, have been appropriated to them as more proper to be determined by the Rules of the Canon and Civil Laws, than by the stricter Maxims of the Common Law. These Causes, as well as others of a more Spiritual Nature, may well be presumed, by the Practice of many Centuries, to have received fixed and settled Determinations, according to those Rules ; and the introducing new Maxims from a different Science, however suitable they may be to that Learning, however adapted to that part of our Constitution, must in this create Variety and Uncertainty ; whereas Certainty is justly stiled by Lord Coke, the Mother and Nurse of Repose and Quietness ; for which Reason the Author of the *Codex Juris* might very properly point out the Occasion of any Alteration or Uncertainty.

If there be originally any thing of a *Temporal* Nature in the Cause, if any *Temporal Incident*,

Incident arises, is it not frequently removed out by a Prohibition, *quoad*--- while it is depending in the inferior Courts, before it comes to the Delegates, and thereby the Cause becomes more merely and undeniably Spiritual ? There are Judges provided by the Constitution, who may be Laymen, to determine such Temporal Matters as are by Law appropriated to the Cognizance of the Ecclesiastical Courts, by Rules to which the Common Lawyers, *as such*, are Strangers ; and is it not a great Hardship upon those Courts, must it not necessarily create an Uncertainty, that they may be adjudged to have done wrong, because their Judgments are not according to Rules, which they are not obliged to go by, or rather are obliged *not* to go by ?

If we take a View of the Education, the Study, the Business of the Gentlemen of the Common Law, we shall have no Reason to think that they have more Leisure or Inclination to make themselves Masters of another Profession, than the Clergy can have ; which would still be more easy to them, the Course of whose Learning, in their own Profession, necessarily leads them into the Knowledge of the ancient Councils, and the Canons of the Church. Their first Studies are the same, in polite Literature ; but those, whose Thoughts are turned towards the Bar, must find the Learning of the Common Law extensive enough to take up their whole Time : When they attend the Practice of it, great part of their Time is necessarily spent in making themselves Masters of those Facts, upon which each particular Cause depends ; the rest, in turning to those Books, which their former Studies may have pointed out to them : And they, who from the

Fatigue of the Bar can scarce allow themselves Time for necessary and common Refreshments, will not easily be tempted to turn their Thoughts to a different Study.

When with great Learning, fine Parts, and indefatigable Industry, they have arrived at the Honours of the Bench, and might well expect *Otium cum Dignitate*, it is hard to be then employed in sifting out new Learning from the Ruins and Rubbish of Antiquity ; to learn new Rules ; that their few vacant Hours may be spent in judging in those Courts, which the *Examiner* says are Inferior and Subordinate to their own. And in case any thing merely Temporal should happen to be left in the Cause, they may be obliged in their superior Capacity to *prohibit* themselves.

It must then be frequently expected, that they will apply those Rules, of which they are so perfect Masters, and to which they have so long been accustomed, to the Causes there depending before them, altho' different from the Rules of the Ecclesiastical Laws. This Variety of Rules must create a Variety of Determinations ; and the poor Suitor, who has hitherto been successful, is in pain to know according to what Law he is to be judged ; and his Council can hardly, with Credit, advise, being themselves doubtful, which Rule will take place.

I may further, I believe, venture to say, that the learned Judges of the Common Law would not be displeased, if there were a stated Commission of Delegates, or any other Scheme, which his Majesty might approve of, whereby they might obtain a Discharge, and be eased of the Burden of these Commissions ; nor can

it be disagreeable to them to be informed by his Lordship, that it is a Burden which the Constitution has not laid upon them.

The Truth of the Fact is not then denied, nor the Time (*Anno 1639*) when these Mixtures first began, and Noblemen and Common Law Judges came into Commission. The Clause of *Quorum* is still more modern, whereby a Delay is not only unavoidably occasioned, whilst those in the higher Stations cannot possibly attend ; but what is worse, a Negative is introduced contrary to the Rules of the Civil and Canon Laws, and not intended by the Statute, which directs,

"That a Commission shall be granted to such Persons, as shall be named by the King's Highness, his Heirs, and Successors, like as in case of Appeal from the Admiral's Court." Can it be pretended that this was *then* the Rule in Appeals from the Admiralty, tho' it is now likewise become so ? I believe it will not. And when a Thing is complained of as improper, is it of no Importance to show it to be an *Innovation* ; that is, of a Date more *modern* than the Institution of the Court, without any Law to introduce it ? If his Majesty should be pleased to restore it to its first Institution, one may then reasonably hope, that the *Examiner* will not put a Negative upon the Crown, or dictate to his Majesty, in a Matter which depends on his own Wisdom to direct him. What ground is there then for his exclaiming against their Excess of Power ; or are not the Losers in common Reason to be indulged to complain ?

Every one knows how great a Cloud the Bishops *began* to be under, about the Time mentioned [1639;] and how well soever the Administration might *wish* the Bench, it is well

known, that at that Time they *durst* not shew it, nor set themselves to protect them from such Oppressions and Insults as the Times exposed them to, and from which the State soon after was unable to defend itself; for the Enemies to both were the same.

When the Bishops were under Persecution, and afterwards abolished, it was a proper Juncture to introduce and establish the Practice of bringing Noblemen and Common Lawyers into their Places.

To support this Practice then, he would have the whole depend upon the *Fitness* of the Thing; but he will not allow the same Privilege of arguing from *Fitness*, on the Head of Prohibitions, because it is next Door to Treason to suggest, that what has been anciently practised may possibly *not* be Right.

Exam.
p. 61.

Nothing can be more unfair, than the Use this Writer makes, in many Places of his Book, of a Clause in the Preface to the *Codex Juris*, relating to the Extracts from the *Reformatio Legum Ecclesiasticarum*; and to show the Unfairness of it, once for all, little more will be necessary than to set down the Clause at large.

Pref. p. 14. " The Citations out of ancient and modern
 " Councils and Synods, which have been held at
 " Home and Abroad, (as they are annexed here,
 " by way of *Commentary*, to our present Laws)
 " are designed to show, on one hand, that
 " tho' many of the Laws are modern, the
 " Constitution is ancient; and, on the other
 " hand, to facilitate the Improvement of this
 " Constitution, by suggesting such useful Rules
 " of Order and Discipline, as have been esta-
 " blished Abroad, or attempted at Home.
 " With

" With which *last* View it is, that many of the
 " Passages out of the Body of the Ecclesiastical
 " Laws, entitled, *Reformatio Legum*, &c. are
 " grafted into this *Commentary*; as Candidates
 " for a Place in our Constitution, in case the
 " Convocation shall think them deserving; or,
 " at least, as not unworthy the Consideration of that
 " Learned and Venerable Assembly."

1. Then, by changing the Word *Commentary*
 into *Work*, he leaves his Reader to suppose,
 that the learned Author did so fully approve
 them, in whole and in every Part, as to give
 them a Place in the Text, among the Acts and
 Canons established by Authority. If he had no
 such meaning, why did he not use the Words
 as they stand in the Preface?

2. He breaks off at the Word *deserving*,
 and leaves out the following Words; or, *at*
least, as not unworthy the Consideration of that
 Learned and Venerable Assembly. I charge it
 upon his Conscience, whether he did not *in-*
dustriously leave out those last Words, that he
 might more easily convince his Readers, that
 the Author of the *Codex* recommends the Clauses
 he extracts out of the *Reformatio Legum*, as fit
 to be made part of our Constitution, intirely
 as they stand there, without *Addition*, *Diminu-*
tion, or *Alteration* of any kind? Is this the p. 105.
 Man who solemnly declares, he would not do
 his Lordship any Injustice? Was he not sen-
 sible that the Convocation might consider of
 many Laws which they could not enact or alter,
 but must apply to the supreme Legislature for
 it; and did not that last Clause interfere too
 much with his intended Reflections, viz. of
 their being *improper Patrons* to introduce these
 Improvements, encroaching upon the Authority

the *Legislature*, altering *Statutes* by Spiritual Power, inconsistent with our *Constitution*, in diminution of the *Prerogative*, and contrary to the *Act of Submission*, and all those hard Words he so freely bestows ? And I appeal to every candid Reader, whether the learned Author could have guarded against being understood to mean what he would infer, with greater Caution than he has done ; and whether any one could suppose him to have been so void of all Sense, as to imagine, that Laws made almost 200 Years ago could be suited in *every Respect* to the present State of Things, and received otherwise, than as first compared with the Laws which have since been made, and accommodated to them ? Upon the whole, whether any Person of common Candour could fix any meaning upon the Clause, and his inserting in the Commentary some Passages which may be found in the *Reformatio Legum*, than that he thought, upon any Design to review and improve the Ecclesiastical Constitution, it might be of use to know, what were the Sentiments of those learned and able Men (the ablest, beyond doubt, among the Bishops, Civilians, and Common Lawyers of that Time, who early after the Reformation compiled that Body of Laws;) submitting it wholly to the Judgment of the Convocation, how fit or unfit they *now* are to be received, or recommended by them, in part, or in whole ? In this View, they are properly called Candidates, and offered only as such, to be submitted, like *Candidates* of all other kinds, to *Enquiry* and *Examination*. And altho' the *Examiner* had not approved them, he might have treated them with more *Respect*, and have considered,

considered, that his Lordship's Candidates were Cranmer's Pupils.

This is an Answer to all the Passages he has picked out of the Commentary upon the *Codex*, as cited out of the *Reformatio Legum*; and if he had fairly considered them in this Light, and could have prevailed with himself to forbear the curtailing the Clause, with an *injurious Design* to make them appear in another Light, he might have made his Work much shorter, and saved himself a good deal of Trouble, as well as Shame.

But as I have gone thro' his Reflections in general, as to the Sufficiency of the Body Spiritual, wherein he has so far, at least, been consistent with himself, as not to omit the least Opportunity, by any possible Construction or Torture, of turning them to his Lordship's Disadvantage; there are others less general which may deserve Consideration, wherein the Reader will do him the Justice to think, that the Passages which he has taken Exception to, out of so large a Work, are those which he thinks have the greatest Tendency to the publick Prejudice, if not the only ones which he finds exceptionable; for had it been only a Difference in Opinion from other learned Men, it could not be presumed to have so far excited his Zeal, as to require his publick Testimony for the Sake of Truth, attended with such Reflections upon one in his Lordship's Station, at this Season, and at this critical Time, when not only our Church, but Religion itself, is so publickly attacked; and yet he, with his usual Candour and Veracity, has set them in the worst Light he possibly can: Notwithstanding which,

Exam.
p. 183.

I assure my self, that upon Re-examination they will be found, tho' attended with no less personal Rancour, to have as little Foundation as the other. He has referred to eleven more of those Laws or Canons, which the *Codex Juris* recommends to be considered; and as he owns that some of them *seem to merit the Consideration of the Legislature, as tending to the Improvement of our Constitution*, there are many others of which he has taken no notice; so that we may be sure, that if any of them had not been clearly so, and incapable of an *odium* Representation, they had not been spared. Tho' the Irregularity in his *Examination* may occasion an immethodical Reply, yet he will excuse me in not following him altogether in *his Method*, which seems to have this only Rule, to observe, anticipate, postpone, or repeat, just as it might serve to introduce some new Reflection.

The great Overflow of Vice and Profaneness, which we have seen in this Kingdom for some Years past, will warrant those who lament and lay it to Heart, in proposing any Expedient for giving a Check to it; and also justify a Concern at the Loss of any Law, which was a manifest Restraint upon it. And therefore the learned Author of the *Codex* might have hoped to have escaped such a particular Animadversion for what he had said concerning the ancient Method of *Canonical Purgation*, which affected neither Liberty nor Property, but was a Branch *Justitiae Prævenientis*, which Lord *Coke* so much recommended. And if the learned Author had added, That this Law was in full force till the 16 Car. 1. troublesome Time of King *Cha.* Its Reign, when an Act was obtained, which intended to take away all the ordinary Power and Coersion in Ecclesiastical Causes, and that it was finally taken

ken away in a *very vicious* and *loose Reign* (that of King *Charles 2d*) it is no more than the Truth.

The *Examiner* is willing to mistake both the Nature of common Fame, and that of Purgation. He says it was thus ; “ Persons accused Exam. “ upon common Fame, were upon this Accu- p. 80. “ sation alone, *unsupported by any Evidence*, “ cited to appear in the Spiritual Court, and “ there charged with the Crime. If they de- “ nied the Charge, the Judge assigned them to “ appear with five or six of their Neighbours “ (who were called Compurgators) and to make “ a Purgation ; which was done by the Defen- “ dant’s swearing to his own Innocence, and the “ Compurgators swearing that they believed what “ he had sworn to be true. If the Defendant re- “ fused to purge himself upon his own Oath, or “ could not procure Compurgators to swear, as “ before, for him, he was looked upon as Convict, “ and the Judge proceeded to Sentence, in the “ same Manner as if he had been convicted by his “ own Confession, or upon Evidence.” This is p. 81. said “ to carry the Ecclesiastical Jurisdiction to “ a Pitch of Tyranny, even beyond the Oath, “ commonly called the Oath *Ex Officio*. The “ bare obliging a Man to accuse himself, or to “ answer upon Oath in a criminal Process, “ is contrary to natural Justice, and to the “ Equity and Moderation of all Laws, except “ only the Canon Law.”

On the contrary, no Persons were put to their Purgation upon common Fame, unsupported by Evidence : Neither did common Fame, in a legal Sense, mean any general Report or Scandal, which might have arisen from malicious Persons, and without Foundation ; but such, as from Circumstances and Presumptions had gained Credit and Belief, and had given

given great Offence to the Grave, the Sober, the better Part of the Parish. Crimes which are subject to Ecclesiastical Enquiry, as Simony, Adultery, or such like, are naturally sought by the Delinquents to be kept hidden, and are committed secretly : These are Works of Darkness, and such as are hardly to be proved by Witnesses. Yet when by Circumstances once known Abroad, they come to be vehemently suspected, and offensive to the well-disposed, and, for the evil Example, dangerous to be suffered, it is reasonable that they should be discovered and punished to deter others from the like : And Churchwardens are sworn to enquire diligently, and truly to present from Time to Time such Crimes, and the Fame thereof : Yet if any Person was prosecuted, either upon the Presentment of Churchwardens, *Ex Officio*, or by Accusation, he had the Liberty to deny that there was any Fame, such as I have before mentioned ; and before he could be put to his Purgation, a legal Proof was required of those Circumstances and Presumptions which had occasioned the common Fame ; and if they failed in the Proof thereof, he was acquitted ; but if proved or confessed, he was then admitted to his Purgation.

The Reason the Law assigns for Purgation, after a Fame is proved, is this : *Licet nemo tenteretur seipsum prodere, tamen proditus per famam tenteretur seipsum ostendere, utrum possit suam Innocentiam ostendere & seipsum Purgare.* The Ground of the Law is, that the Offence which is given to the Church by the publick Scandal and Example, ought to be removed ; whereas *Ecclesia non judicat de Occultis.* Penances enjoined by the Ordinary, are not taken in Law to be *Pænæ*, but

but *Medicinae*, as tending to the Reformation of the Delinquent, the Example of others, and the Satisfaction of the Church, offended justly at his lewd Conversation. And I may say, that the same Proof that is generally required of a Fame, might in many Cases be sufficient to convict before a Jury; and that therefore the Purgation was a Privilege, whereby the Person might be allowed to clear himself of that Scandal which otherwise called for the Censures of the Church, and not an Oath whereby he accused himself.

Those, who at the Beginning of Queen Elizabeth's Reign opposed the Government of the Church of *England*, did not complain of the Severity of this Proceeding, or call it Ecclesiastical Tyranny, but on the contrary blamed it as too mild, that it did not only not advance and forward the edifying of the Church, but passed over the Offence too lightly, and thereby encouraged those Crimes which deserved a severer Punishment. And one *Millayn*, a Fellow of Christ's College in *Cambridge*, a Disciplinarian ^{Stryke} of *Cartwright's* Party, in a Sermon preached at *Whitg.* St. Mary's, inveighs against it, and says, ^{Append.}

" That by the Canon Law, if a Man or Wo-
" man be never so much suspected of Advoultry,
" if the Party bring forth twelve to swear, ^{n. 12.}
" that they think he hath not committed that Adultery.
" Crime, he is by and by cleared; whereby
" many Advoultries are boulstred." One would
not now have expected a Charge of a different
Nature to arise from an Assembly of those who
pretend to a severer Discipline.

A late Author, who would be very unwilling to be thought to carry the Power of the Church in any Point too far, in his Treatise of *The Nature*

p. 88.

Nature and End of the Sacrament of the Lord's Supper, speaking of "the Primitive Discipline of Christians in Justin Martyr's Age, who informs us, that they only were allowed to be Partakers of the Eucharist, who lived as Christ had commanded; For my self (says he) I think Justin Martyr could mean no more by it, than that professed Christians, who were scandalously immoral in the habitual and open Conduct of their Lives, were not permitted, before some Signs of Repentance appeared, to partake of this Religious Rite --- I take the Foundation of it to be

p. 89.

"this, and this only, that the admitting Persons to the Communion was esteemed to be an Acknowledgment of them as Christians fit to be received into the Company, and to partake in the Religious Offices of such as are really so ---- This was thought a proper Way to bring them to some Sense of their Sins, or, if that could not be done, of vindicating the Honour of the Christian Society from the Scandal of such Members." It was the Scandal then that gave the Offence, for which they were to be excluded from the Communion of Christians, for the Vindication of the Honour of our Religion, and which ought to be purged. The Offence is the same, where upon good Grounds it is generally believed, tho' perhaps a direct Proof cannot be come at; and woe be to him by whom the Offence comes.

p. 90.

But to bring this to the *Examiner's* only Touchstone of natural Equity and Justice, *the Common Law*; let us enquire whether in the like Case, the Subject does not suffer as much by the Laws of the Land, as they would do by this Practice of the Canon Law: And as it is

is a Rule, *Interest Reipublicæ peccata nocentium puniri*, whether any Government could be supported, without some Proceeding upon Fame: And if the Person should chance to be innocent, his Imprudence at least is generally the Cause of what he suffers.

Lord Coke, in his Comment upon *Magna 2 Inst. Charta*, says, “ When Treason and Felony ^{p. 52.} is committed, and the common Voice and Fame is, that A. is guilty, it is lawful for any Man that suspects him, to apprehend him. This Fame Brancton describeth well: *Fama, qua suspicionem inducit, oriri debet apud bonos & graves, non quidem malevolos & maledicos, sed providas & fide dignas Personas; non semel sed scipiis; quia clamor minuit, & Defamatio manifestat.*” Further, “ If a Man keep Company with a notorious Thief, whereby he is suspected, &c. it is a good Cause, and a Warrant in Law to arrest him.” Oath then being made of the Circumstances from whence the Suspicion arises, he may, I presume, be committed to Prison. In some Cases, if he can find Bail, he may be discharged upon Bail [more hard, I believe, to get, if he be poor and have otherwise a good Reputation, than Compurgators ;] if not, dragged from his House and Family, his Friends and Business, he is imprisoned, fetter'd, and if he has no Money, half starved, till there is an Opportunity of bringing him on his Tryal ; and then, (if I may be allowed to call his Jury his Compurgators) if they find no Reason to think him guilty, paying his Fees, he is discharged. Which had this poor Man rather have done, either have purged himself by the Oath of himself and Neighbours, or even have done

Penance,

Penance, or have lain one Day in Goal? And yet a *Common Fame*, such as I have described, is all the Foundation of both.

Tho' it has been a great Pleasure to the *Examiner* in hearing, when he attends Quarter Sessions and Goal Delivery, the Proclamation read, and the Charge given against Vice, Immorality and Profaneness; yet, I am afraid, it must have given him some Uneasiness, especially at the Latter, to hear a Man with a hoarse Voice loudly proclaim an Invitation to all manner of Persons, who can inform his Majesty's the King's Justices, the King's Serjeant, his Attorney General, &c. of any Treasons, Murders, Felonies, &c. as if it were not "acting the
 " Part of a vigilant and prudent Magistrate,
 " but of an Inquisitor; a little mischievous
 " Animal, who is so perpetually on the Hunt
 " after Crimes only that he may have the
 " Pleasure of Correction, as he calls it." He would certainly make a most excellent Magistrate, who could take more Pleasure in giving the Charge, than in the Execution of it.

But however upon this Head of Purgation, as Self-Defence may probably induce many to desire a Continuance of this Restraint upon the Discipline of the Church; and altho' by the monstrous Increase of Perjury of late Days, the Oath of the Accused might give but little Satisfaction to wipe off the Scandal; might not his Lordship, or any good Man, without Censure, wish, that either a Purgation, arising from the Proof of their general Reputation, and the Oath of their Neighbours, might be made, or else some Satisfaction be given to the Church, by those who give Offence, by a suspicious

Exam.
p. 81.

picious and scandalous Way of living? But how the Ground of such a Suspicion can be construed to be “ a laudable Action *misper-*
 “ *stood*, whereby a Man may draw upon him-
 “ self so general an Odium, that the World
 “ may be tempted to take an unmanly Pleasure
 “ in seeing him humbled at any rate,” wants
 Explanation. Does not the *Examiner* rather
 seem to wish for that *unmanly Pleasure*, by en-
 deavouring to make a laudable Action *misper-*
stood ?

The same Concern to see Vice and Immorality of all Kinds effectually restrained and punished, might have entitled his Lordship to this Writer's Indulgence, if he wished, that, as there are many Exceptions in general Acts of Pardon, Prosecutions for Lewdness and Immorality depending in the Spiritual Courts, might have been one Head of Exceptions, and that such Criminals might not escape by virtue of those Pardons, after a long Prosecution, and where Sentence is ready to be given, as it may often happen.

Tho' his Majesty does always with greater Pleasure show Mercy than execute Justice, yet too great a Tenderness may turn to the publick Prejudice ; and Lord Coke observes, that *spes 3 Inst. Impunitatis continuum Effectum tribuit Delin-* p. 236. *quendi, sic venie facilitas Incentivum est delin-* Epilogue. *quendi* ; and therefore Pardons should be rarely granted. But the Reason our first Reformers went upon, was, that some Satisfaction ought to be made to the Church, before Persons guilty of great Crimes, tho' pardoned, should be received into its Communion, *Donec salubriores Cogitationes suscepint*, as the Extract from the *Reformatio Legum* expresses it. But this barba-

rous Man by traducing those Laws chuses to wound the Memory of poor martyred Cranmer, (who could hope for no Pardon but from Heaven, and underwent the Tortures of a merciless Reign) rather than lose the Handle of any one Reflection on the Bishop of London.

He thinks, or at least is willing to have his Readers think, that he has found his Lordship in an *artful* Omission, of a reported Case in Relation to a Clerk convicted of Manslaughter. In a Work of so great Variety, some Oversight and Omissions might easily happen, without *Art* or *Design*; and that great Lawyer, Sir Edw. Coke, who is so often referred to, is not always so happy as to have his Opinion now thought to be Law; and even in Facts he may sometimes have been mistaken, which Mr.

Pref. to Cotton's Abr. of Records of the Tower. Hob. 228. *Prynne* says " was the Oversight of that great Ornament of our Law, of which he has given Instances to rectify the Mistakes and Misrecitals, which he may have led others into, without the least Intention to detract any Thing from his Venerable and due Worth and Memory." Had this been the present Design, had this been the Tendency of the Examination, no Offence could be taken; but let the Reader judge thro' every Part, if it be not the direct contrary; nay, I may leave it to the Conscience of the *Accuser*. But if we enquire more fully into the Case of *Searle* and *Williams*, which is brought to justify the Charge, it cannot be thought an Omission, unless it were necessary for every Author, not only to produce the Authority upon which he grounds his Opinion, but likewise to refer to others, which he may not think so well founded, in order to contradict

tradict it. This, I confess, could not be called *Artful*. But if he who charges an Omission as a Fault, be guilty of it in that very Argument, let him fall under his own Censure.

In the Chapter of the *Codex, &c.* entitled, Tit. 45. *The same Crimes punishable both in Spiritual and Temporal Courts*, after the learned Author has made good that Position by way of Commentary on the Stat. 9 Ed. 2. c. 6. entitled, *Where a Suit for one Offence may be prosecuted both in Court Spiritual and Temporal*, he adds, “ It was hinted before, that this Rule holds not in *Capital Crimes*, but however in such Cases, the Infliction of Ecclesiastical Punishment is not WHOLLY EXCLUDED ;” which is expressed with as much *Caution* and *Tenderness* as can be. In support of this, he mentions the Case of *Searle*, a Clergyman in *Essex*, who having been found guilty of Manslaughter, and Cro. Ja. allowed his Clergy, was afterwards sued in the Ecclesiastical Court in order to be deprived. His Case was this: 13 Jac. *Searle* was convicted of Manslaughter, and allowed the Benefit of the Clergy: The Patron of his Living presented *Williams* to the Living, as being void by that Conviction: He was prosecuted before the Chancellor of *London*, as being *convicted* of Homicide, in order to found a declaratory Sentence upon his Conviction: He appealed from that Court to the Archbishop’s, where he desired to be admitted to his Defence, that he was *not Guilty*. Dr. *Bird*, the Archbishop’s Judge, came to Lord Chief Justice *Hobart* for his Directions, who says, “ And I (tho’ I doubted not yet) confer’d, and we agreed, that Felony and other Capital Crimes were not examinable in the Ecclesiastical Courts, no, not

rous Man by traducing those Laws chuses to wound the Memory of poor martyred Cranmer, (who could hope for no Pardon but from Heaven, and underwent the Tortures of a merciless Reign) rather than lose the Handle of any one Reflection on the Bishop of London.

He thinks, or at least is willing to have his Readers think, that he has found his Lordship in an *artful* Omission, of a reported Case in Relation to a Clerk convicted of Manslaughter. In a Work of so great Variety, some Oversight and Omissions might easily happen, without *Art* or *Design*; and that great Lawyer, Sir Edw. Coke, who is so often referred to, is not always so happy as to have his Opinion now thought to be Law; and even in Facts he may sometimes have been mistaken, which Mr.

Pref. to Cotton's Abr. of Records of the Tower.

“ was the Oversight of that great Ornament of our Law, of which he has given Instances to rectify the Mistakes and Misrecitals, which he may have led others into, without the least Intention to detract any Thing from his Venerable and due Worth and Memory.” Had this been the present Design, had this been the Tendency of the Examination, no Offence could be taken; but let the Reader judge thro’ every Part, if it be not the direct contrary; nay, I may leave it to the Conscience of the *Accuser*. But if we enquire more fully into the Case of *Searle* and *Williams*, which is brought to justify the Charge, it cannot be thought an Omission, unless it were necessary for every Author, not only to produce the Authority upon which he grounds his Opinion, but likewise to refer to others, which he may not think so well founded, in order to contradict

Hob. 228.

tradict it. This, I confess, could not be called *Artful*. But if he who charges an Omission as a Fault, be guilty of it in that very Argument, let him fall under his own Censure.

In the Chapter of the *Codex, &c.* entitled, Tit. 45. *The same Crimes punishable both in Spiritual and Temporal Courts*, after the learned Author has made good that Position by way of Commentary on the Stat. 9 Ed. 2. c. 6. entitled, *Where a Suit for one Offence may be prosecuted both in Court Spiritual and Temporal*, he adds, “ It was hinted before, that this Rule holds not in *Capital Crimes*; but however in such Cases, the Infliction of Ecclesiastical Punishment is not WHOLLY EXCLUDED;” which is expressed with as much *Caution* and *Tenderness* as can be. In support of this, he mentions the Case of *Searle*, a Clergyman in *Essex*, who having been found guilty of Manslaughter, and Cro. Ja. allowed his Clergy, was afterwards sued in the Ecclesiastical Court in order to be deprived. His Case was this: 13 Jac. *Searle* was convicted of Manslaughter, and allowed the Benefit of the Clergy: The Patron of his Living presented *Williams* to the Living, as being void by that Conviction: He was prosecuted before the Chancellor of *London*, as being *convicted* of Homicide, in order to found a declaratory Sentence upon his Conviction: He appealed from that Court to the Archbishop’s, where he desired to be admitted to his Defence, that he was *not Guilty*. Dr. *Bird*, the Archbishop’s Judge, came to Lord Chief Justice *Hobart* for his Directions, who says, “ And I (tho’ I doubted not yet) confer’d, and we agreed, that Felony and other Capital Crimes were not examinable in the Ecclesiastical Courts, no, not

" for Purposes that were examinable there, as
 " in this Case of Deprivation ; and therefore
 " they may not *originally* examine such a Crime
 " to prove a Man criminous ; much less when
 " he is so proved in the proper Court, to im-
 " peach the Sentence, in a Court improper :
 " But they may build a Sentence of Deprivation on
 " such a Conviction, and they are bound by it, and
 " it is dangerous for a Judge Ecclesiastical to
 " come against it." With what Colour of Truth
 could this be represented as " a hasty extrajudicial
 " Opinion of Lord Chief Justice Hobart ?"
 It was indeed extrajudicial, but far from *hasty* ;
 tho' he doubted not, tho' he was clear in his
 own Opinion, yet he *conferred*, and they *together agreed*.

Cro. Ja.
430. Hereupon, the Ecclesiastical Court proceeded,
 and *Trin. 15 Jac. Searle* applies to the Court of
 King's Bench for a Prohibition. The Case was
 argued ; *Richardson, Serjeant* for the Plaintiff,
 insisted on a Case determined in the Common
 Pleas, 27, 28 *Eliz.* (which was that of *Nichols*)
 where a Prohibition had been granted. The
 Stat. 18 *Eliz.* was likewise considered, and the
 ancient Method of Purgation ; and it was said
 by the Court, that tho' the Statute ordains, that
 after Clergy the Party shall be set at large,
 yet that doth not *disaffirm* the Judgment : And
 it was agreed by the whole Court, that no Pro-
 hibition ought to be granted. This is, by the
Examiner, with equal Fairness, called a *very indigested Report* of the same Case in *Crook James*.
 Let any one consult that Case, and he will find
 it as full, as clear, and as express, as most in
 the Book. But the *Examiner* would represent it,
 not only as a Carelessness in the Reporter, but a
Surprise on the Court ; and it is said, that
 " the

" the Court of King's Bench upon a *sudden Motion*, refused to grant the Prohibitions." The Cause had now been depending near two Years ; one of the Chiefs consulted ; a Conference had with others ; and, upon this Motion, the Council argue, the Judges deliberate, the Canon as well as Common Law is considered, the Reasons are assigned, and the Court is unanimous ; and yet to lessen the Authority of this Precedent, it is called a *sudden Motion*.

The same Case in the Court of King's Bench is also reported by *Rolls*, under the Title *Prerogative le Roy*, (a Title overlooked by the *Examiner*) and " it is a Justice I owe to his Readers, to acquaint them with it." *Rolls* agrees with *Crook*, that " it was resolved by the whole Court, that before the Stat. 18 Eliz. c. 7. if an Incumbent had been convict of Homicide by Verdict, and could not purge himself of it, it was a good Cause of Deprivation ; but it would have been otherwise if he had purged himself. But now, tho' the Purgation be taken away by 18 Eliz. yet the Crime remains, and the Conviction of Homicide by Verdict will bind him, and so he may be deprived for it." He takes Notice likewise of the Case of *Nichols* and *Chafe*, where a Prohibition had been granted 27, 28 Eliz. in the like Case. How came he, who is endeavouring to charge his Lordship with an artful Omission, to be guilty of this ? He has referr'd to the same Book, under the Title *Prohibition*, in order to lessen the Authority of this Determination in the King's Bench. This agrees with the Report in *Cro. James*, and which shows, that it could not, with Justice, be called a very indigested Report. It shows, that the

² Rolls
Abr. p.
222. n. 2,
3, 4.

² Rolls
Abr.

p. 305.

Argument before the King's Bench turned upon the same Point, as it did afterwards in the Court of *Common Pleas*, upon the Purgation of Clerks, and the Stat. 18 *Eliz.* and the Precedent of *Nichols* after that Statute. Was this Omission wilful? If so, what Credit can we give to his Veracity? Was he ignorant of it? What Reliance can we have on his Judgment? This is manifest, that he has studied more the Title of *Prohibition*, than that of *Prerogative le Roy*.

Under this unanimous Opinion of the Court of King's Bench, the Cause is permitted to go on; and the next Year, after an Appeal to the Court of Delegates, a Prohibition was granted in the Common Pleas, 16 *Jac.* There was a Declaration in Prohibition, and upon a *Hob. 288.* *Searle and Williams.* Demurrer, Judgment was given upon open Argument by all the Judges (of that Court whereof Lord *Hobart* was Chief) that he ought not to be questioned now in the Spiritual Court for this Manslaughter, AS THE CASE STANDS.

Considering what had passed, it may reasonably be presumed from these Words, Now, and as the Case stands, that some Alteration had happened therein, some Addition to the Plea in the Spiritual Court, since the denying the Prohibition in the King's Bench. But suppose there had not, and that the Learned Author had in his *Thoughts* at that Time the Judgment in the Court of Common Pleas, Is the Determination of that Court, (which is not superior to the King's Bench, but whose Judgments, if the Client be not tired out with Law, may be reversed in that Court,) of so great Weight, that no one, at the Hazard of his Reputation, may adhere

adhere to the Judgment of the Court of King's Bench?

But upon a Charge of this Nature, it may be worth while to enquire into the Foundation of this Judgment of the Court of *Common Pleas*, and leave it to the Learned in the Law to determine between the two Courts: For it will not, I believe, be insisted on, that it is the Best because it was the Last; or that, because it is on Record, it must therefore be infallible.

The Doctrine of Purgation of *Clerks convict* was therein fully discussed: It was allowed that "when a Clerk convict was delivered to the Ordinary *absque Purgatione*, he could not then admit him to a Purgation," and consequently, he was to be deprived according to the Course of the Ecclesiastical Laws: And as it was thought unreasonable to admit a Clerk to his Purgation, who had been convicted at Common Law, it seems to be no less absurd, that he should be discharged and should retain his Benefice after he was convicted; and that a Conviction should have less effect, than his failing in *Purgation* would have had. And no Stress can be laid upon that Circumstance that he was not to be delivered to the Ordinary after Conviction; for we may observe, that the Head of the Act 18 Eliz. is an Order for the Delivery of *Clerks Convict*, without Purgation. And the former Method of delivering them to the Ordinary was, that he might imprison them; the Statute having provided for that, and having left it to the Discretion of the Justices to imprison, rendered the former needless.

The Distinction whereon Lord *Hobart* grounded his first Opinion, and the Judges of the Court of King's Bench their Denial of the Pro-

hibition, was his Lordship's Assertion, viz.
 " That even in Capital Crimes, the Infliction
 " of Ecclesiastical Punishment is not wholly
 " excluded." The Words in Hobart's Report
 are clear and express: *If they [the Ecclesiastical*

*Judges] would not controvert nor re-examine the
 Acts of the King's Court, but build their Sentences
 upon them, they were not to be prohibited; as, if
 they did deprive a Man by Sentence because he was
 convicted or attainted of Felony, Murder, or Man-
 slaughter, at the Common Law;* and that in this

Hob. 292. Case it was so until the making of the Statute, but that the Statute freed the Clerk à *Culpâ* & à *Pænâ*, not by a supply of *Purgation*, but by a **KIND OF STATUTE PARDON**. It might well be called a *Kind of Pardon*, for it was admitted that there are no Words in the Statute which express it. It is true that the learned Author of the *Codex* refers in several other Parts of the Book, to the Report of the Case in the Court of Common Pleas; but in a Work so large, and of so great Variety, can it be fair to charge an Omission (if this had been one) as *Wilful*, because the Author does not carry in his Head and refer to every Thing he has said upon that Subject elsewhere; and because in considering a Report with one View, he did not consider at the same Time to how many *other* Points it might relate; especially, when the Report itself is upon a Point that had been quite out of Doors for 130 Years, as the Practice of *Purgation* of Clerks Convict had been; and when it is owned on all Hands, that there are no *Words* in the *Act* to which it refers, that contradict the Doctrine which the *Codex* lays down upon the Authority of that Judgment, which after

after long and mature Deliberation was given in the Court of *King's Bench*.

Were this Point to come again under Consideration, would not these Doubts be expected to be cleared? Whether a Pardon being exclusive of common Right, does not require some particular and express Words to that Purpose? And as by Homicide a Clergyman becomes *Irregular*, *i. e.* is *ipso facto* disabled from performing any Part of his Function, whether a Pardon without any express Words, or by Implication only, discharges his Disability? How often may he offend in this Particular? And whether, if he be freed from the Fault as well as from Punishment, as often as this Crime may again be committed, he is not to be looked upon as an innocent Man upon every Conviction? If the Statute makes him Innocent, why should he forfeit his Goods at Common Law by the Conviction? Or if he may forfeit them at Common Law, why may he not forfeit his Benefice according to the Ecclesiastical Laws of the Land? And why the same Statute which makes him *Guiltless*, should leave it to the Discretion of the Justices to *imprison* him for a Twelvemonth? These are Difficulties, which the *Examiner*, if he had pleased, could *perhaps* have resolved us. But implicit Faith may be more reasonable in Law, than it is in Divinity.

I can't forbear taking Notice of another Opinion of Lord *Hobart*, which may show that he thought *Homicide*, notwithstanding this Statute, might have an Ecclesiastical Consideration. *George Abbot*, Archbishop of *Canterbury*, being shooting in *Bramzil Park* in *Hampshire*, upon an Invitation by Lord *Zouch*, his Arrow glanced, and

and wounded the Park-keeper, whereof he died. Upon the Coroner's Inquest, his Death was found to be by Accident. The Archbishop, apprehensive that by the Canons of the Church, he might have incurred *Irregularity*, humbly submitted the Consideration of his Case to his Majesty, who was pleased by Letter dated 3d Oct. 1621, to refer it to the Lord Keeper and several Bishops, Sir H. Hobart Lord Chief Justice of the Common Pleas, Justice Dodderidge, and two Civilians, who all gave their Opinions under their Hands; and altho' they could not determine whether under the Circumstances of this Case, any *Irregularity* were incurred, yet they humbly certified to his Majesty, to this effect, *viz.*, "That we *all* agreed
 " not only that a Restitution, or Dispensation,
 " may be granted by your Majesty immediately
 " under the Great Seal, or (which most of us
 " in all Humility represent unto your Majesty)
 " by the Hands of some Clergymen, dele-
 " gated by your Majesty to that Purpose, or
 " what other way your Majesty shall be pleased
 " to extend that Favour. But withal, we are
 " of Opinion, that it is *most fitting* for the said
 " Reverend Father, both in Regard of his
 " Person and the Honour of the Church, to
 " sue unto your most gracious Majesty for the
 " said Dispensation *in maiorem Cautelam, si qua*
" fortè sit Irregularitas." Accordingly, his
 Majesty granted a Commission to eight Bishops
 under the Broad Seal, by virtue whereof they
 granted him a Dispensation. If the King and
 the Bishops had only been concerned in this, I
 might expect the *Examiner* would call it a
 Farce: But when so great Men in the Law,
 as Lord Hobart and Judge Dodderidge, act their
 Parts

Spelman's Reliq.

p. 121.

their Parts in it, he must imagine that they did not look upon all the Laws of the Church relating to Homicide superseded by the 18 Elizabeth.

That in some other Crimes, a Conviction at Common Law may be the Foundation of a Proceeding in an Ecclesiastical Court, cannot well be denied. *William Townshend*, Parish Clerk of *Warminster*, about the Year 1726, being prosecuted in the Ecclesiastical Court, in order to be deprived, for several Acts of Sodomitical Lewdness, besides other Vices and Immoralities, applies for a Prohibition, which was granted by the King's Bench, *quoad* the Sodomitical Lewdness, which was indictable at Common Law; what was left to the Power of the Ordinary, amounting to no further Censure than a Monition, the Proceedings stopped, and, notwithstanding the great Offence that it created, he continued to join with the Minister in the Doxology, and sung on to the Praise and Glory of God. The Parish were at last so far scandalized, that an Indictment was preferred against him at the Expence of the Parish; he was convicted, punished, and then the Court granted a Consultation, that the Ordinary, upon that Conviction, might deprive him.

His Lordship could deserve Censure from no good Man, if he wished the Ordinary had a Power to remove such Offences as these from the Church. Shall they, who would be excluded from all sober Conversation, be permitted to continue, not only in the Communion, but in the immediate Service of the Church, until such Time as a Prosecutor may be found? Had the Ordinary a Power, it would be his Duty to correct; but it is no part of his Office to be

be an Informer and Indicter at Common Law. Yet this is the Scheme of Church Power, that is to be render'd terrible to the Nation. Is it not hard, that the Power of the Church of England should be less, only because it is by Law established; that it should have less Right to punish these Offences, less Power to exclude those from her Communion, who bring such Scandal on our Religion, than any Christian Church in the World hath or ever had?

May not this very Instance of Searle and Williams convince us, how just it might be, to have the Grant of Prohibitions confined to a single Court. Here is a poor Clergyman, presented to a Living, after a long three Years

Hob. 288. Course of Law, two Appeals, the Cause being begun in the Consistory of the Bishop, appealed to the Court of the Archbishop, and thence to the Delegates, secure as he might think himself, under the private clear Opinion of one of the greatest Judges, under the publick unanimous Opinion of one of the greatest Courts in the Kingdom; stopped at last by the different Judgment of another Court: Here we find Court against Court, Judges against Judges, and even one Judge against himself. Sure nothing could be more equally divided; and when in all Probability the Suitor was undone, the Precedent is made.

It is a Maxim received in all Courts of Justice, that no Person is presumed to be ignorant of the Law. Strange Presumption, under these Difficulties! Surely our Laws in being of all Kinds, are in many Cases so various and uncertain, so burthensome and unequal, that they require the ablest Hands to digest and new model them: A Work by which (so far as the

the digesting Part goes) the Author of the *Codex Juris* might well hope that he was doing some Service in the Ecclesiastical Way. And as he had the Honour to receive the Thanks of the Clergy in Convocation, for the Service they thought he had done the Church by that Work, I doubt not but any other Man or Body of Men, who should instruct and enlighten the Lay-Subject by a like Digest of the *Temporal Laws*, would receive great Acknowledgments from the Body of the People.

When the *Examiner* would exempt the Laity from all Obligations to the Canons made in Convocation, and ratified by Royal Authority ; he admits “ That the Convocation may make “ Constitutions, by which the Spiritualty shall “ be bound, for this, that they all by Repre- Exam.
“ presentation, or in Person, are present.”^{p. 149.}
The Authority, from his *old Books*, tells us
“ that the Clergy may bind themselves as strong-
“ ly by an Act of Convocation, as the Laity ^{21 Ed. 4.}
“ may by an Act of Parliament bind them-^{45.}
“ selves.” And he would have these Laws relate to *Persons* and not to *Things*. But as to serve his Purpose he can blow either hot or cold, when his Lordship mentions a Restraint upon Ecclesiastical Persons from making Grants, especially of Offices in Reversion, to the Prejudice of their Successors, by the Authority of Convocation, (not so as to declare the Grants void, but by Ecclesiastical Censures to restrain them from doing it) this is “ restraining them “ from exercising a Power which the Law ad-
“ judges, and his Lordship admits to be inherent “ in them;” and which he thinks “ can only “ be done by Authority of Parliament.” Does
he

he mean inflicting Ecclesiastical Censures? His
 21 Ed. 4. old Books tell us that the Act is Spiritual, tho'
 45. the Grant when made be Temporal; and it
 20 H. 6. had been but common Justice in him, when he
 13. says, that his Lordship admits, if he had told his
 Praef. Reader in what manner he admits it. " That
 p. 26. " the Power of the Bishops to grant, is an
 " Allowance, and not a Command: The Law
 " declares such Grants good *when* made, but
 " does not direct them *to be* made: In this the
 " Bishop is at his own Liberty, as much as
 " ever, no Restraint being therein laid upon
 " him by the Law, either of Church or State.---
 " The present Point is not so what Degrees the
 " Law *will extend* such Grants, but to what
 " Degrees the Bishops *may limit* them." The
 Bishop's Concession then can no ways support
 his Argument; and, unless his own Authorities
 be false, the Clergy have Power, in Convoca-
 tion, to bind themselves *in Re Ecclesiastica*.

Before the restraining Statutes, Ecclesiastical Persons might make long Leases, prejudicial to their Successors, and no Temporal Law controuled them, but they were allowed when made; and yet by the Ecclesiastical Laws, the Persons were deprivable as for a Dilapidation, when it was done to the Hurt of the Church. As he has then no Objection to the Reasonableness of the Restraint, his Flourish upon his resuming this Point, " Whether shall the Canons
 " of the Church controul Common or Statute
 " Law? Whether the Act of Submission shall
 " continue to be a real and effectual Restraint
 " upon the Clergy in Convocation, or a dead
 " Letter?" is nothing to the Purpose; since
 the Question is not, whether a Canon can *con-
 troul* Common or Statute Law, but whether Re-
 gulations

Exam.

p. 152.

gulations of all Persons and Things which are of Ecclesiastical Cognizance, so far as such Regulations are not *contrary* to Common or Statute Law, may not be made by Ecclesiastical Authority, *i. e.* by Canons made in Synod, and ratified by the King, as supreme Head of the Church.

Is it possible, that any one who has the least Notion of what is meant by *a Father's Love*, or of *the Bowels of a Parent*, should be severe on any Proposal for preventing the Misfortunes arising from unhappy Marriages, whereby the Quiet and Repose of Families are destroyed, their Honour tarnished, and their Estates consumed? To see a Daughter fly from her Parents Care and Protection into the Arms of his Footman, his Gardiner, a broken Gamester, or distemper'd *Beau*: To see the Son, the Heir perhaps of an honourable Family, seduced, and linked with a common Prostitute, the Refuse, the *Relict* of the Town, whilst Insolence and Extravagance is all she brings, and the Mothers Diseases are entail'd on the Family: How would a Parent, thus deprived of his Hopes, his Expectations, the Comfort of his Age, excluded even from conversing with his own Flesh and Blood; how would he, I say, have blessed the Man who would have thought of a Law to have prevented this terrible Calamity? How often has it been thought worthy of the Consideration both of the Convocation and Parliament to provide a Remedy against this Evil, tho' no effectual Means has yet been found? And perhaps it never can be effected by any other Method, than by what his Lordship has proposed, *the vacating of the Marriage*; at least

as

as to all its legal Effects, Fortune, Dower, Maintenance, Administration, &c. Let the greatest Care imaginable be taken in Licences, yet Perjury, (too frequent in these Cases,) will break thro' it. In Publication of Banns, that is more easily evaded ; a Lodging taken in a distant Parish, a false Story, supported by the Assertion of any Parishioner, will elude the Caution of the Minister. Besides, this is trusting the Power, not only with every beneficed Man, but with every Curate, if not with every Parish Clerk in the Kingdom. Where they are good, they will be mindful of their Duty ; where bad, as some such always will be found, the Fear of Punishment will not be weighed against an immediate Reward.

Tho' the Rule in general may be good, of avoiding the Marriage of Children had without the Parents Consent, as by the *Roman Law* it was, and is still practised in many Nations ; yet in particular Cases, this may want an Equity : A Child may have an independent Fortune, and there have been Instances of Parents trafficking with their Childrens Happiness, or reserving them for a Match from whence they themselves may have an Advantage : They may, upon Views inconsistent with a Parent's Care, prevent a suitable and advantageous Match ; they may use them cruelly to force their Inclinations, and make their Lives unhappy, to compel a Marriage, unequal and of fatal Consequence. Is it not reasonable then that there should be some indifferent Judge between them, that the Magistrate should in such Cases interpose ; and can this be called stripping *all* Parents at once of their Parental Authority ?

The

The Wisdom of the *Roman Law* (where Paternal Power was carried to the greatest Height,) provided against this Inconvenience.

Qui Liberos quos habent in potestate injuriā Dig. Lib.

prohibuerint ducere uxores, vel nubere, (vel 23, Tit. De Ritu

qui dotem dare non volunt) per Proconsules, nuptiar.

Præsidesque Provinciarum coguntur in Ma- l. 19.

trimonium consentire & Dotare." This is now the Law in France; and it is mentioned by Dr. Ridley, as a Defect in our Laws.

But Ridley's Lordship's Extract from the *Reformatio View, Legum*, whereby Recourse was to be had to the Ecclesiastical Judge, was probably founded on the *Nature of the Cause*, that as all Matrimonial Causes are under his Cognizance, the Differences between Husband and Wife, the settling of Alimony, and such like, these might likewise be taken under the same View: And it is mentioned by Dr. Ridley, as a Means whereby the Civil Law may be made useful, without Prejudice to the Common Law. But that Circumstance might be easily altered, if the Substance of the Law should be judged convenient; and this is inserted in the *Examination*, only to alarm the Laity, as if nothing could content our learned Author, but the seeing every Circumstance of the Laws he has referred to, enacted by Authority.

The melancholy, the compassionate Condition of many of the Inferior Clergy, as it moved the Royal Commiseration, and as the Augmentation that was given by the late Queen has endeared her Memory to the Nation, so it may likewise, with great Humanity, be thought on, by any one who wishes well to Religion, and the Instructing of the People in

their Duty. That Provision, short of her Royal Mind, and less extensive than their Wants, by reason of their great Numbers, works but slowly towards their Relief. It has been computed by an accurate Hand, that the Number of Livings in this Kingdom under fifty Pounds a Year amounts to *Five thousand five hundred ninety seven*, of which *One thousand and seventy one* do not exceed ten Pounds a Year, *One thousand four hundred sixty seven* more not above twenty Pounds a Year. And the Augmentation by the Queen's Bounty alone, (computed from the Year 1714, which was the first Year any Living was augmented) will be 339 Years before all the small Livings, as yet certified, will be made up fifty Pounds a Year; and if one half of them be made, in Conjunction with *Benefactors*, it will require 226 Years, before they are brought to that Value: Whilst a common Trade will afford a more comfortable Subsistence, and make a better Provision for a Family, than the Remainder of the Livings in *England* will generally do: And if some little Matter can be saved, it is owing more to their Virtues and Economy, than to the Value of their Preferments: Yet these have had a liberal Education, and no small Expence to fit them for their Profession. Thus has the *Examiner* as little Reason to complain of the *Wealth*, as he has of the *Power* of the Church.

Is it then his Scheme to have these Livings divided into Thirds, (for these smaller Livings were the Subject of the Argument and Enquiry) according to the ancient Canonical Portions, *viz.* one Third to be laid out in the Repairs of the Church, one Third to be given to the Poor, and the other to be reserved for the

See the Postscript to Dr. Lavington's Sermon before the Sons of the Clergy 1734.

the Maintenance of themselves and Families ? For it cannot be presumed that he intended to burthen the Lay Impropriators. Or was it only to bring an Odium on the Clergy, as " being possessed of a Trust Estate, that they applied too large a Share of it to their own Use ; whilst the Claim of the Church is a manifest Deviation from the original Institution, which entitled the Clergy to no more than an equitable Division of the Tythes : But the Clergy being intrusted with the Distribution, tho' under the Caution of having Witnesses thereto, quickly engrossed the whole to themselves, subject only to the insignificant Burden of the Repairs of the Chancel ?"

Exam.
160, 161.

I believe if he will look over his Quotations again, he will find that this Division or Distribution related only to Cathedral and Conventual Churches, and not to the Establishment of the Parochial Clergy. The Bishop and his Clergy originally lived together in the Mother Church, and from thence went thro' the Diocese to instruct the People. The Tythes, which belonged to the Mother Church, according to the *Canonical Distribution*, were divided, one Fourth to the Bishop, (an invidious Portion it would now be thought) one Fourth to the Clergy, one to the Fabrick, and the other to the Poor. Neither can they justly be represented as regardless of their Trust, considering the many stately Churches built by them ; and that in some Dioceses those Tythes have been portioned out, and settled for the Maintenance of near 1200 Incumbents ; and till some time after the Reformation, when many of those Tythes were come into Lay Hands, and many

Decret.
can. 12.
qu. 2.
cap. 30.

lost by Custom, there was no Occasion for Laws to maintain the Poor. The Parochial Clergy were obliged to Hospitality; but the Repairs of the Body of the Church, and in some Places of the Chancel, by the immemorial Custom of the Realm, belonged to the Parishioners. In Conventual Churches the Division was in Thirds, one to the Clergy, one to the Fabrick, and one to the Poor.

Each Church had an Officer chosen out of their own Body, called the *Œconomus*, who (as the Treasurer in some Cathedrals) was to take care of the Revenue, make the Distribution, provide for the Fabrick and the Poor; and not as a Guard set over the Clergy, as is represented. In the Council of *Chalcedon* it is said,

Anno 455. "Placuit omnes Ecclesias habentes Episcopos,
Deer. " etiam *Œconomum* habere de proprio Clero,
Dist. 89. " qui gubernet Ecclesia res cum arbitrio sui
cap. 4. " Episcopi, ut non sine Testimonio sit Guber-
natio ipsarum Rerum Ecclesiasticarum." From
hence is taken the Expression in *Egbert's Canons*,
1 Spelm. "Et secundum Authoritatem Canoniam coram
259. " testibus dividant." Those Canons are entitled,
Labbaei Concil. *Excerptiones Egberti Eboracensis Archiepiscopi. E*
Tom. 6, *Dictis & Canonibus Sanctorum Patrum concin-*
p. 1586. *natae ---- In quibus scriptum est quomodo Canonici*,
i. e. Regulares Clerici, vivere debent. This is
the Caution which the Wisdom of those Ages
provided.

As the Power and Interest of the Regulars increased at the Court of *Rome*, and they by a servile Compliance were made the chief Tools of its Tyranny, many of them gained Exemptions from the Episcopal Authority, and were made immediately subject to the Pope. In order to provide for his own Creatures, he was

was very easy in granting them Appropriations of Benefices, the Cure whereof was generally supplied by a Vicar, endowed only with small Tythes, or some Portion of Tythes allotted to them. Thus were the *Secular Clergy* left with the whole Care upon them, whilst the *Regular Clergy* enjoyed in Indolence and Ease, what should have been the Reward of *their Labours*. In larger Towns, the Subsistence of the Clergy generally depended upon *Personal Tythes and Oblations*.

When these Holy Drones, increasing in Vice, Insolence, and Ignorance, as well as in Number, were drove out of their Cells, upon the first Reformation, the Plunder which they had made of the Revenues of the Church was given to the Laity; whilst due Care was not taken of returning some Part, at least sufficient for a Maintenance, to those Cures which had been robbed by them. Thus the Lay Impro- priations have no better an Original than the Tyranny and Oppression of the Court of *Rome*. And the Failure, thro' Custom, of the Pay- ment of personal Tythes and Oblations, re- duced the Clergy, in the larger Towns, to the Want of a Subsistence; where, considering the great Duty that lies upon them, they ought to have been more amply provided for.

The *Examiner* thinks it "not improper to inform those of his Readers, who have not made these Matters their Study, that by *Personal Tythes* the Clergy meant a full tenth Part of the clear Gains of Merchandise, Husbandry, Manufactures, and of every other lawful Occupation;" and this he calls "the most grievous Tax upon Industry the Lust of Power ever suggested." It had

been but fair in him to have added these Words,
 Cap. 13. as they are in the Statute, 2^d and 3^d Ed. 6.
 § 7. " His Charges and Expences, according to his
 " Estate, Condition, or Degree, to be therein
 " abated, allowed, and deducted," which is
 a material Omission: With these Deductions,
 and considering the Nature of Trade, when
 personal Tythes were generally due, it cannot
 be thought so exorbitant. And altho' he calls
 it the most grievous Tax, I wish his Intention
 be not to point out one which he may think
 still greater, viz; the Payment of Praedial and
 mixed Tythes, where no Allowance is made
 for the Charges and Expence, and which origi-
 nally had the same Foundation.

p. 163. To support his Argument, he has ventured
 upon an Assertion, which, *he knows*, is false:
 It is, " That these Tythes were never due in
 England of common Right, never otherwise
 than by special Custom in some particular
 Parishes; and are lost and gone for ever,
 where an immemorial uninterrupted Custom
 cannot be proved;" Tho' at the same time
 he admits, " That the Canon his Lordship has
 been pleased to cite, is very full and clear
 for the Payment of Personal Tythes," Had
 he said that they were now due only by Custom,
 and not of common Right, it is what is gene-
 rally held; but to say they never were, that it
 was never otherwise than by special Custom in
 particular Parishes; *he knows* to the contrary.
*Amicus Socrates, amicus PLATO, sed
 magis amica VERITAS.*

To pass over the Laws of the first Saxon
 Kings, whereby the Payment of Tythes in ge-
 neral is established, and the Times and Manner
 of Payment directed; The Laws of King
 Edward

Edward the Confessor, (which he is not ignorant of) about 1042, make them more certain, and amongst the several Species enumerate, *Lambard* cap. 8. “ *De omni Annonâ decima Garba Deo Archæ.* “ *debita est : si quis Gregem Equarum habu-* LL. *Ed-* “ *erit, pullum reddat decimum ---- De apibus* ^{vardi, p.} *verosimiliter decima Commodi.* Quin de ^{138, 139.} *bosco, de prato, de aquis, de molendinis,* ^{Dr. Wil-} *parcis, vivariis, piscariis & hortis, & N.E. Edwardi,* “ *GOTIATIONIBUS, & de omnibus rebus quas* ^{p. 197.} “ *dederit Dominus, decima ei reddenda est,* ^{198.} “ *qui novem partes simul cum decimâ lar-* “ *gitur --- Hæc enim prædicavit Beatus Au-* “ *gustinus, & concessa sunt à Rege Baronibus &* “ *Populo, sed poitea Instinctu Diaboli multi* “ *eam detinuerunt.* ” These Laws were confirmed by *William the Conqueror*, and asserted upon Oath to be the ancient *Laws* and *Usage* of the Kingdom. Thus were they *once* certainly due of common Right, tho' they may have since been lost by Custom.

But to show that they had not only been long due of common Right, established by the Authority of the great Council of the Kingdom ; we shall find they still continued, till those Statutes were made in the Reigns of King *Henry 8*, and *Edward 6*, in order to enforce the Payment of them, which occasioned the Loss of them. The very Year before the Grant of *Magna Charta*, whereby the *Rights* and Privileges of the *Church of England* were confirmed, viz. 8 *H. 3.* was the Constitution made in the Council of *Oxon*, under *Stephen Langton*, Archbishop of *Canterbury*, whereby all Persons, who do not pay their Tythes, are decreed Excommunicate. “ The Reader may meet with the *Canon at large in the Collection at the End*

of the Oxford Edition of *Linwood* under the
 Year 1222." They are recited almost in
 the same Manner as in the Laws of King Ed-
 ward the Confessor. *De omnibus Fructibus Ter-
 rarum, de apibus & nutrimentis Animalium, & de
 Fætibus quos nutriunt ---- & de omnibus que reno-
 vantur per annum, pïscationibus, molendinis &
 NEGOTIATIONIBUS.* Can it then be doubted,
 but this was a *Right* belonging to the Church,
 at the Time of the Grant of *Magna Charta*?
 This is further explained and enforced by a
 Constitution made in the Council at Merton,
 under Archbishop *Winchelsea*, 33 Ed. 1. Anno
 1305, to which his Lordship had referred.
 The Authority of these Constitutions were in-
 disputable, and were received as Law in those
 Courts which had the proper (I may say at that
 Time the only) Cognizance of Tythes; and I
 may defy him to show any Instance of a Pro-
 hibition upon account of *Custom*, until after the
 Time of the aforesaid Statutes; and his Lord-
 ship had no Occasion to show, that a *domestick*
 Canon had been *received* here, or that our own
 Provincial Constitutions were binding, which
 were not repugnant to the Prerogative of the
 Crown, or contrary to the Laws and Customs
 of the Realm.

Ch. 20. The Statute 27 H. 8. (after the Canons had
 been so far confirmed by Parliament) complains,
 " That sundry evil-disposed Persons, in sundry
 " Counties, Towns, and Places of this Realm,
 " having attempted to subtract, winsome Places
 " the whole, in some Places great part of their
 " Tythes, as well PERSONAL as Prædial." And Enacts, " That every Subject of this
 " Realm, according to the Ecclesiastical Laws
 " and Ordinances of the Church of England,
 " and

“and according to the laudable Uses and Customs of their Parish, shall pay his Tythes and Offerings.” And appoints a Remedy for the more easy Recovery thereof. The Statute 32 H. 8. gives a further Remedy, and enables Lay Impropriators to sue, who could not before sue in the Ecclesiastical Courts, and were without Remedy at Common Law, (so far were they at that Time from claiming a Jurisdiction in that Case;) and the Words are there the same, “according to the Ecclesiastical Laws and Ordinances of the Church, and the laudable Uses and Customs of the Parish.” Ch. 13.
 This Evil still increasing, the Statute 2 and 3 Edw. 6. confirms both the former; and after having provided a further Remedy, against those who carry away their Pradial Tythes, § 13. without setting them out, directs, “That personal Tythes shall be paid by all such Persons, and in such Places as heretofore within these 40 Years,” (that is about the latter End of the Reign of King Henry 7.) “have accustomedly used to pay such Tythes, or of Right ought to pay.” The Words *de Jure & Con*suetudine**, as also *Junta laudabilam Ecclesiæ Con*suetudinem**, was the Language of the Ecclesiastical Laws, and was never construed exclusive of common Right. And by the same Statute it was directed, That no Suit shall be brought for Tythes before any other Judge than Ecclesiastical; which Statute is unrepealed. However, these Statutes have afforded so many Handles for Prohibitions, that the Right, by Interpretation, being restrained to Custom, the Ordinaries have not only lost their Jurisdiction in most Cases, but the Clergy in most Places their *personal* Tythes.

What

What is then to be inferred from his Lordship's Quotations? That all personal Tythes should be restored according to their ancient Extent? Far otherwise. That it should be in all Places? Not so neither. It is only that the Clergy in Cities and Market Towns, who were heretofore supported by *personal Tythes* and *Oblations*, and the great Tythes upon that account more easily obtained for the Religious Houses, which being now either wholly withdrawn, or greatly lessened, are generally speaking worse provided for than the rest of their Brethren, might have a Provision, either from a certain Contribution to a reasonable Sum, or by a Rate on Houses, as in the City of *London*, i.e. for every Pound Rent, to the Parson or Vicar 2 s. 9 d. or as by the intended Law in the *Reformatio Legum*, a Tenth according to the Rent of Houses, where no Praedial Tythes are paid. That the ordinary Produce of such a Tythe should be equal to a Land Tax on Houses at 4 s. in the Pound, which is general, thro' the whole Kingdom; or that 2 s. or 2 s. 9 d. is the same when paid to the Church, as 4 s. is to the State, is, I must own, new to me, and can only be proved by this Writer's Arithmetick.

Where would be the Prejudice in this to our Constitution; or where is the Danger that it should be understood, that *sixteen* of the *Laity*, as well as *sixteen Ecclesiasticks*, under a Commission from the Crown, by Authority of Parliament, Men of Religion, Learning, and Experience, well skill'd in the Laws, both Spiritual and Temporal, were sensible of this Evil, and in a Disposition to redress it? Or is it so certain, that whatever relates to the Rights of

the

the Clergy, if once lost, is in no part to be recovered? *Vestigia nulla retrorsum?* Or can this be unworthy the Consideration of the Convocation, or even be more properly submitted to the Wisdom of Parliament to redress, than by an Application from that venerable Assembly, the collective Body of the *Church of England*; that they, who have so often extended their Aid towards building of Churches, by such a Representation might see how unsuitable a Provision is made for the Ministry, and not think it undeserving their Care.

The last Alarm he gives to the Laity is, that the learned Author of the *Codex Juris* has endeavoured to subject all Lay Impropriations to a Power in the Bishop, to augment the Vicarages and Curacies, which by such Impropriations are deprived of a competent Maintenance. By the ancient Statutes it was expressly provided, ^{15 Ric. 2.} _{4 H. 4.} that upon all Appropriations the Vicar be well and sufficiently endowed, and that otherwise they should be void and disappropriated for ever; and it is true that his Lordship has observed, that before the Dissolution, and while they continued in the Hands of the Religious, the Impropriations were liable to a further Provision for the Curate or Vicar than had been first settled, and that those Impropriations were given to the Crown in the same State and Condition, and the same Manner and Form, as the Religious enjoyed them. In which Words an ordinary Understanding would be apt to include all Burdens as well as Emoluments: But the Fears of the Laity will not be very great, when they and the Clergy are in the very same Place informed by him, *That nothing is more clearly deliver'd in the Books of the Common Law, than the contrary*

Doctrine,

Doctrine, viz. That being now *Lay Fées* they are in that Point entirely freed from the Spiritual Jurisdiction. It is therefore left to their own Consciences; and I may refer them to the Treatise of the Learned Sir H. Spelman, *De non Temerandis Ecclesias*; whose Judgment tho' the Examiner may not in that Case approve, yet he dares not censure.

It may not be improper here to mention two CANDIDATES, which have been set up in Opposition to these. They had their Education in a different School, and received their first Rudiments from a different Tutor; and if they did not owe their Rise to the Lust of Power, it was from as pernicious a Principle, *Amor seculatus babendi*; or, as it is better expressed, to Covetousness, which is Idolatry.

The one was to take away from Churches and Colleges the Reversion of their Estates, and to give it to their Tenants. The gradual Decrease of the Value of Money had occasioned, that the Leases which had formerly been granted by them to Tenants at the full Rent, had become greater in Value than what was anciently paid, which was supplied by a Fine paid upon every Renewal. They had granted, and indeed could grant no more than a certain Term, and those who purchased of former Tenants could purchase no more than their Term, and the Estate remained theirs in Fee, as much as in any other Subject in the Kingdom: Yet what would be thought very unjust to others, was to be made a Law to them; and their Tenants to have a Right of Renewal at a certain Sum. And thus as the Necessaries of Life grew dearer, the Value of Money still decreasing, they were to be restrained to the ancient Fine: And those

those wise and providential Laws of Queen Elizabeth, the restraining Statutes, which were designed to preserve the Revenues of the Church and Colleges in Succession, were at once to be defeated, to serve the avaritious Views of some of their Tenants.

The other was a Scheme for more effectually preventing the Growth of Religion, by starving the Clergy. They had found by Experience how successful to their Purpose former Laws had proved in relation to personal Tythes, by putting them on the Foot of Custom only, and that at present, tho' those Statutes had manifestly and declaredly a contrary Intention, there were scarce any of those Tythes which now remained, or could be recovered, and those generally trifling. It was therefore proposed to put the Praedial Tythes, and all other Income of the Parochial Clergy, upon the same Footing, whereby in another Century they might hope to swallow up all, and get them into their own Families: And in the common Course of Things this Lay Craft must have prevailed, nor could it have proved otherwise. The Variety of Customs in the Manner and Place of Payment of praedial and mixed Tythes, creates such Difficulty very often in receiving them in kind, that it encourages voluntary Compositions, or Agreements for Tythes in general, without distinguishing each particular Species: Those Compositions being varied, the Payments would become uncertain and unfixed, so that in time, neither Tythes in Kind, nor any certain Sum could safely be demanded. A corrupt Patron, a Non-Resident Clerk, a litigious purse-proud Parishioner, an Incumbent poor or infirm, easy or indolent, might make them glad to take whatever

whatever the Proprietor shall be pleased to give; and if hereafter it should be thought proper to withdraw it, the Successor would have no certain Custom to depend on, after a long Incumbency; for Custom must be uniform, uninterrupted, immemorial: And every powerful or vexatious Parishioner, upon every the slightest Pretext, would create an Exemption. Thus, in process of Time, scarce an Incumbent in *England* could have hoped for a Subsistence. The Clergy might then, as the *Examiner* allows, have made *Fasting Days* now, but they could have made few *Holidays*.

As his Lordship had the principal Share in averting this impending Danger, and defeating so destructive a Scheme, it must endear him to the Clergy of *Great-Britain*; and they cannot but look on the Reproaches cast on him, as arising from his Care of them: But notwithstanding these Attempts to discourage it, we may still hope, from the Fidelity, Vigilance, and Care of the *Hierarchy*, from the Strength of our Laws, and the Establishment of our Constitution under his Majesty's most gracious Protection, that they will still be able to defeat all the crafty Designs of their Enemies. What can they mean, who are turbulent and uneasy, and always aiming at Alterations in our Constitution? We are now secure under our present happy Establishment, and the Protestant Succession in the present Royal Line, secure from Popery, Superstition, Anarchy, and Arbitrary Power; but when they attempt to remove Foundations in any part, what may become of the whole Constitution, God only knows.

I hope that I have shown the *Testimony* born by the *Examiner* against the Principles laid down

down in the *Codex Juris Ecclesiastici Anglicani*, &c. to be false in its Foundation, false in Fact, and false in the Application : And having re-examined his Lordship's Candidates, I shall venture the Censure of the *Examiner*, by adding one more : But lest it should be represented by him as a *Scheme of Church Power*, I may observe that it came from a free State, where it was found necessary to restrain the Wantonness of Liberty ; and having been received in ancient *Rome*, may not be unworthy of being adopted into our Constitution. It is from the *Lex Cornelia De Injuriis.* *Siquis Librum ad Infamiam alicujus pertinentem scripserit, composuit, ediderit, dolore malo fecerit, quo quid eorum fieret, etiam si alterius nomine ediderit vel sine nomine, uti de eâ re agere liceret, et si condemnatus sit qui id fecit, INTESTABILIS ex lege ESSE JUBETUR.*

Dig. Lib.
47, Tit.
De Inju-
riis & fa-
moris Li-
bellis. Le.
5. § 9.

F I N I S.





2. TW